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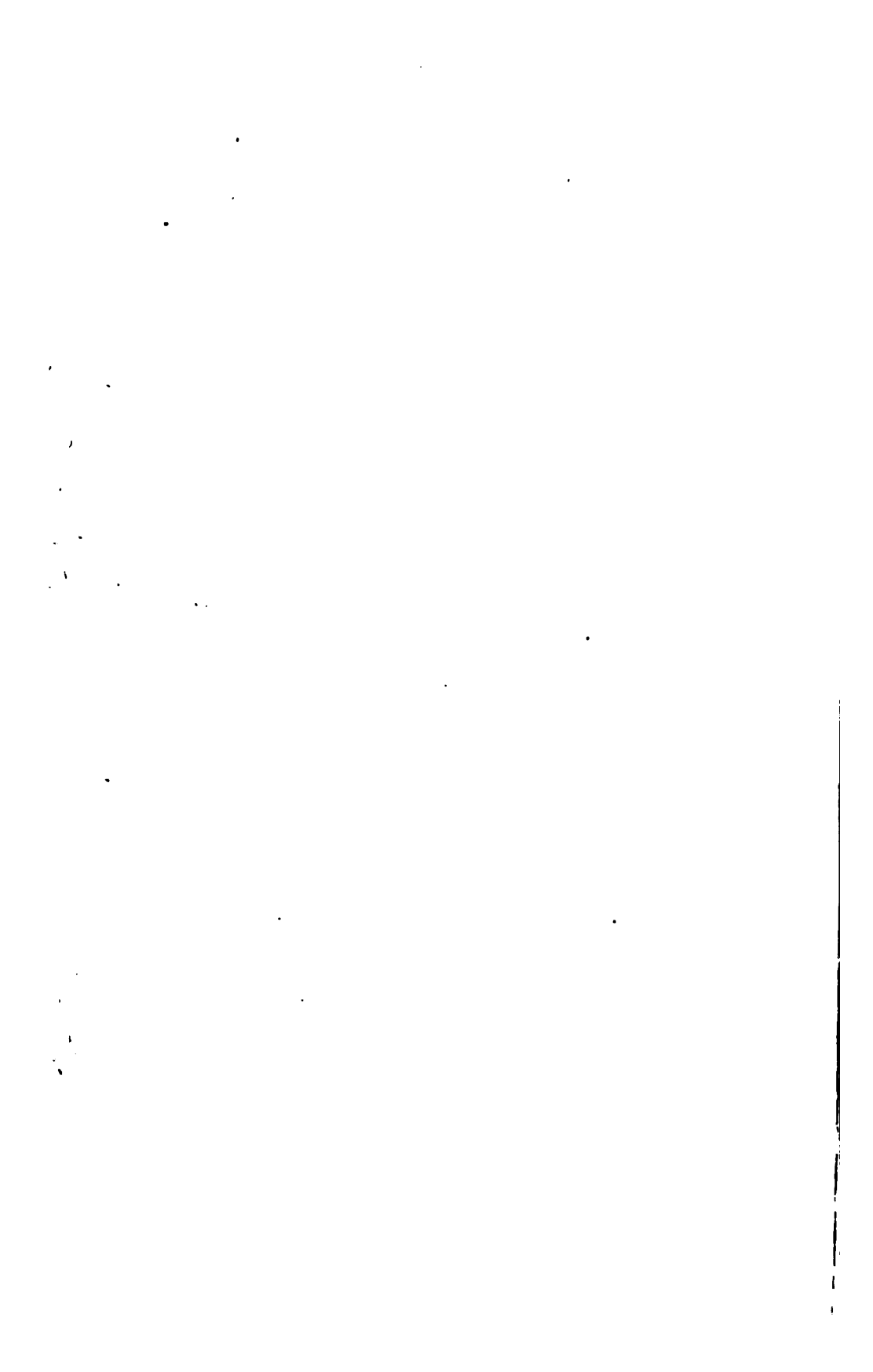
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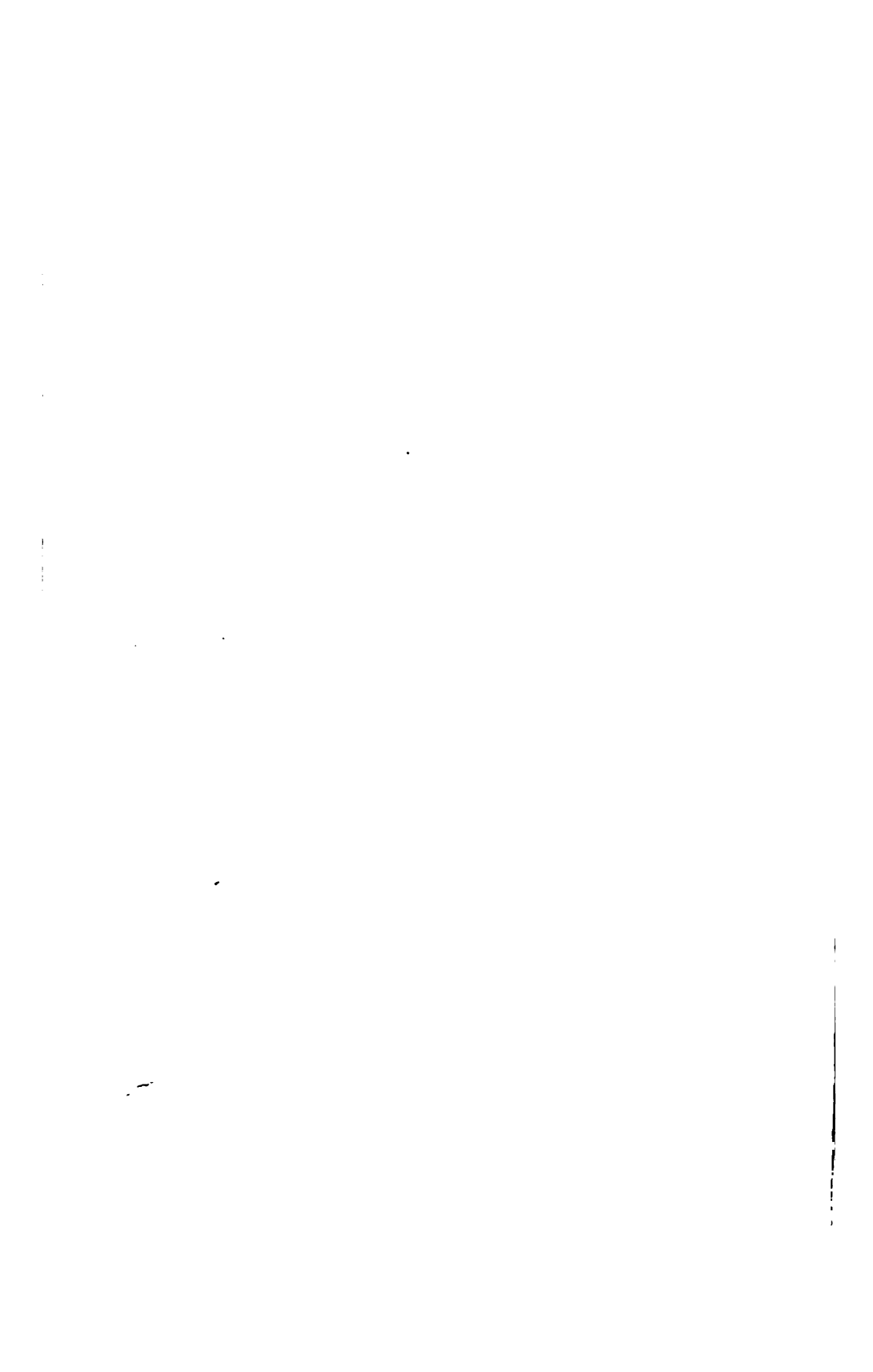
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REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

VOLUME XXXII

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN THE THIRD DISTRICT
IN NOVEMBER AND DECEMBER, 1889, AND FEBRUARY, 1890;
AND IN THE SECOND DISTRICT IN MAY, JUNE,
JULY AND DECEMBER, 1889.

REPORTED BY
EDWIN BURRITT SMITH
OF THE CHICAGO BAR

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DURING THE TIME OF THESE REPORTS.

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THOMAS A. MORAN, <i>Judge</i> ,	- - - - -	Chicago.
JOSEPH E. GARY, <i>Judge</i> ,	- - - - -	Chicago.
JOHN J. HEALY, <i>Clerk</i> ,	- - - - -	Chicago.

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C. B. SMITH, <i>Judge</i> ,	- - - - -	Champaign.
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CHAUNCEY S. CONGER, <i>Judge</i> ,	- - - - -	Carmi.
GEORGE W. PLEASANTS, <i>Judge</i> ,	- - - - -	Rock Island.
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OWEN T. REEVES, <i>Judge</i> ,	- - - - -	Bloomington.
J. J. PHILLIPS, <i>Judge</i> ,	- - - - -	Hillsboro.
JOHN W. BURTON, <i>Clerk</i> ,	- - - - -	Mt. Vernon.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—MAY TERM, 1889.

CHRISTIAN LINCK
V.
WALTER SCHEFFEL, BY NEXT FRIEND, ETC.

Dogs—Personal Injury—Action for Damages—Measure of—Instructions, When Error in Immaterial—Alleged Negligence of Infant—Evidence.

1. On appeal from judgment for plaintiff in an action to recover damages for injury to minor from bite of a dog, it is *held*: That whether or not an instruction on the measure of damages was incorrect is immaterial on either of two grounds: 1st. That no point was made in the court below on motion for a new trial that the damages were excessive. 2d. That the damages were not excessive, hence the defendant was not injured by the instruction, even if erroneous.

2. Instructions which placed plaintiff, a child of seven years, virtually upon the same plane of care and diligence as an adult, should be refused. It is for the jury to determine from the age and intelligence of the child whether he used due care or not.

3. Evidence tending to show that defendant's dog, at other times and to other persons than those referred to by plaintiff's witnesses, was quiet and had never offered to bite, should be refused.

4. Evidence tending to show that plaintiff at other times and places had teased and worried the dog is inadmissible.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Montgomery County; the Hon. J. FOUKE, Judge, presiding.

MESSRS. LANE & COOPER, A. N. KINGSBURY and GEORGE PEPPERDINE, for appellant.

MESSRS. GEORGE L. ZINK and JAMES M. TRUITT, for appellee.

In the case of *Buckley v. Leonard*, 4 Denio, 500, it was held that when the owner of a dog which had bitten other persons had notice of the fact, and afterward suffered him to be at large, when he bit the plaintiff, it was no answer to the action for the injury to the plaintiff to show that the dog was generally inoffensive. The court say such evidence is immaterial.

That case was followed and fully approved by the case of *Mann v. Weiland*, 81 Pa. St. 243.

As early as 1861 our Supreme Court, in the case of *C. & Q. R. R. Co. v. Dewey*, 26 Ill. 258, announced the doctrine that a child could not be required to exercise the same degree of caution and care as one of mature years. That case has been followed by a number of cases. See *C. & A. R. R. Co. v. Gregory*, 58 Ill. 226; *C. & A. R. R. Co. v. Murray*, 71 Ill. 601; *Railroad Co. v. Gladman*, 15 Wall. 408; *Chicago v. Hesing*, 83 Ill. 204; *Kerr v. Forgue*, 54 Ill. 482; *Weick v. Lander*, 75 Ill. 93; *C. & A. R. R. Co. v. Becker*, 76 Ill. 25; *R. R. I. & St. L. R. R. Co. v. Delaney*, 82 Ill. 198; *Meibus v. Dodge*, 38 Wis. 300; *Plumley v. Birge*, 124 Mass. 57; *Lynch v. Smith*, 104 Mass. 52; *Ostertag v. Pacific R. R. Co.*, 64 Mo. 423.

Counsel complain that appellant was not permitted to prove that appellee had thrown stones at the dog, and so had made him vicious toward appellee. The court properly excluded that testimony, because it was immaterial and could only tend to mislead the jury. *Flansburg v. Basin*, 3 Ill. App. 531; *Muller v. McKesson*, 73 N. Y. 195.

In *Smith v. Pelah*, 2 Strange, 1264, held, if a dog has once bitten a man, and the owner, having notice thereof, keeps the dog, a suit will lie against him by one who is bitten, though it happened by such person treading on the dog's toes, for it

Linck v. Scheffel.

was owing to his not hanging the dog on the first notice. In *Arnold v. Norton*, 25 Conn. 92, it was held that satisfactory proof of a single instance of the dog having previously bitten a person was sufficient to establish the bad propensity. See, also, *Ketbridge v. Elliott*, 16 N. H. 77; *Loomis v. Terry*, 17 Wend. 496; *Cockerham v. Nixon*, 11 Iredell, 269; *Worth v. Gilling*, 2 L. R. (C. P.) 1; *Flansburg v. Basin*, 3 Ill. App. 531; *Stumps v. Kelley*, 22 Ill. 140.

CONGER, J. This was an action of trespass on the case. The appellee was a boy aged about seven years, and on the morning of the 28th of November, 1887, was passing appellant's residence with a hand-sled, and there being a slight inclination in the sidewalk in the direction the boy was going he threw himself down upon his sled to coast down the incline when appellant's dog sprang upon him and bit him in the hip. There was some attempt upon the part of the appellant to show that the instant before the boy was bitten he had kicked the dog, or attempted to do so, but the jury, in a special finding, found that he did not, and also that appellant's dog was accustomed to bite mankind prior to the 28th day of November, 1887, and that appellant had knowledge of such fact, which findings, we think, were justified by the evidence. The jury returned a verdict for seventy-five dollars, upon which judgment was rendered, and appellant brings the case here for review.

It is urged that the instructions given upon the measure of damages is not a correct statement of the rule applicable to such cases. The answer to this objection is two-fold: first, no point was made in the court below upon motion for a new trial that the damages were excessive. As said in *Jones v. Jones*, 71 Ill. 563, "Where the damages are excessive the presumption is that on being asked, the court below will require a *remittitur* to the proper amount or grant a new trial. And when no such request is made of the judge trying the case the party must be regarded as having had no objections to the amount of the finding, or, if he had, that he waived them." Second, the damages, in our judgment, are not excessive,

and hence appellant has in no way been injured by the instructions complained of, even if erroneous.

Complaint is made by appellant that the court refused the following instructions:

5. The court instructs the jury that if they believe from the evidence that the dog's biting the plaintiff was provoked by the plaintiff's kicking the dog, and was due to that fact alone, then they should find the defendant not guilty, notwithstanding the plaintiff is a minor.

7. The jury are instructed that if they believe from the evidence that the defendant's dog was irritated and aggravated to bite the plaintiff, by being kicked by the plaintiff, that the plaintiff can not take the advantage of his own wrong and receive as damage for an injury received as a result of his own carelessness and recklessness; and if the jury believe from the evidence that the defendant's dog bit the plaintiff, as the sole result of being kicked by the plaintiff, and not from the fact of being a dangerous and savage animal naturally, they will find for the defendant.

When it is remembered that appellee at the time of the occurrence was only about seven years old, it can be seen that these instructions were calculated to mislead the jury and were properly refused. They virtually place appellee upon the same plane of care and diligence as an adult, entirely ignoring the principle that the jury must determine from the age and general intelligence of appellee at the time, whether or not he used the care required of him by the law. *C. & A. R. R. Co. v. Murray*, 71 Ill. 601, and cases there cited.

The court below refused to permit appellant to show that his dog at other times and to other persons than those referred to by appellee's witnesses, was quiet, and had never offered to bite them, and this ruling we think was right; for it matters not what the dog's general character for peaceableness was, if it could be shown that he had in fact bitten people without justification prior to his assault upon appellee, and that appellant had knowledge of it.

Neither would it have been proper to show that appellee

Reed v. Reed.

at other times and places than the one where bitten, had teased and worried the dog. It would be a dangerous rule to hold that because a thoughtless child should at one time strike or worry a dog he might afterward be bitten with impunity.

We think the verdict is well sustained by the evidence, and no such substantial error occurred upon the trial below as to require us to interfere.

The judgment of the Circuit Court will therefore be affirmed.

Judgment affirmed.

JOHN A. REED ET AL.

V.

ANDREW J. REED ET AL.

Marriage Settlement—Alleged Trust Fund—Bill in Equity by Children against Father to Secure Accounting for Fund Alleged to Have Been Held in Trust for First Wife.

Complainants are children of appellee by a former wife, who died intestate. Prior to his first wife's death she became entitled, under the will of her father, to a distributive share of his personal estate. She personally settled with the executor of her father's estate for this share, by receiving from him a note given by her husband as part of the purchase price of their home farm, purchased by him some time before, and having indorsed upon another similar note the balance of the share due her. The note paid in full she turned over to her husband. The husband subsequently paid out of his own means the balance of the other note. Subsequently the wife, with her husband, sold land devised to her by her father, and the proceeds were chiefly used for household expenses and by the husband in his business. *Held:* That appellee, there being no evidence of an express trust, was not chargeable as a trustee of the funds or property received from his wife for the benefit of her or her children; and that even if the wife had been presumed to have purchased the notes, which were secured by a purchase money lien on the home farm, to protect her dower right, and she were to be considered as subrogated to the creditor's security, that lien could not be enforced under a bill seeking to charge the husband as trustee.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Morgan County; the Hon. C. EPLER, Judge, presiding.

Mr. OWEN P. THOMPSON, for appellants.

If the defendant, Reed, had received in the same way this amount of money from a stranger, would any one question the right of such person to hold him liable as trustee? The rights of Mrs. Reed, and consequently her heirs, can be enforced under the law, as it now exists, the same as if she and her husband had been total strangers. Under the married woman's act of 1861, all the rights of the husband in and to the separate estate of the wife are swept away, and the wife may own, hold, possess and enjoy such estate precisely as though she were sole. As to such estate and her relations thereto she has no husband.

In the case of Patten v. Patten, 75 Ill. 446, the court held that if the husband receipts for and manages his wife's separate estate, with her consent, the presumption is that he does so in the character of agent, and it will not, in deference to marital legal rights, become his property. If the husband claim, as gift, the burden is upon him to establish his claim by evidence. See Tomlinson v. Matthews, 98 Ill. 178; 2 Perry on Trusts, Sec. 666, third edition.

As to the Kirkman land, the testimony of Reed is that it was purchased with what he called the "general fund." The general fund, according to his testimony, was made up of his wife's money and his own, commingled together, the larger portion of it being his wife's. Here, too, the evidence is ample to show a resulting trust. His wife's money was used in purchasing the land, and the deed was taken in his name. Our Supreme Court has held that the wife has an equitable interest in the property to the extent of the money furnished. Haines v. Haines, 54 Ill. 74; see, also, Seaman v. Cook, 14 Ill. 501; Ward v. Armstrong, 84 Ill. 151; Perry on Trusts, Sec. 128; Persch v. Quiggle, 57 Pa. St. 247; Russell v. Jackson, 10 Hare, 209.

The funds which went toward the payment of the purchase price of the Gallagher farm were paid after the deed was made,

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and consequently no resulting trust can be said to exist as to those lands. But we do insist that in equity the \$4,870.51 of Mrs. Reed's money, that went into this farm, and the benefits of it received by Reed, should be held to be a lien on the property, in the nature of a vendor's lien, and should be held subject to sale to reimburse the trust fund. *Wallace v. McCullough*, 1 Rich. Ch. 426; *Perry on Trusts*, Sec. 128.

All of the money which Reed says his wife allowed him to use and which is not a trust impressed upon the lands now held by Reed, is nevertheless money he holds in trust. The name by which the trust is to be known is wholly immaterial, but we have used the term constructive trust as applicable to this fund. The authors of the leading text books on the subject of trusts, viz., Story, Perry and Pomeroy, do not use the same name for the same character of trust, but all agree that where one possesses himself of trust property, or who has defrauded another of his estate by concealment or fraudulent practices, even though no fraud was intended at commencement of the trust relation, is to be held as a trustee by construction or operation of law, and the parties beneficially entitled have the same rights and remedies against him that they would be entitled to as against an express trustee who had fraudulently committed a breach of the trust. *Perry on Trusts*, Sec. 166; *Pomeroy's Eq. Jur.*, Sec. 1044; *Thompson v. Thompson*, 16 Wis. 91; *Pillow v. Brown*, 26 Ark. 240; *McLane v. Johnson*, 43 Vt. 48.

Messrs. BROWN & KIRBY, for appellees.

We respectfully insist that the presumption of law is that these notes were the gift of Susan F. Reed to Andrew J. Reed, because of her love and affection for him, and in support of this proposition we cite the following cases: *Lux v. Hoff*, 47 Ill. 425; *Story's Equity Jurisprudence*, Vol. 2, Secs. 1202 and 1203; *Pomeroy's Equity Jurisprudence*, Vol. 2, Sec. 1041; *Sidmouth v. Sidmouth*, 2 Beavan, 447; *Maxwell v. Maxwell*, 109 Ill. 588; *Temple v. Williams*, 4 Iredell's Equity Rep. 39

PLEASANTS, P. J. Appellants are children of appellee

Andrew J. Reed, by a former wife, who died intestate December 15, 1884. In January, 1886, he married his present wife, after conveying certain lands to trustees for her use, in pursuance of an ante-nuptial agreement. Appellants filed the bill herein, averring that he purchased these and other lands described, amounting to 380 acres in Morgan county, with means of their mother derived from her father's estate and placed in his hands at different times for safe keeping for her and her children, with the understanding between them that it was to be held by him in trust for her, and that in the event of her death he was, as trustee, to account for and pay it over to her children; and praying that he be required to convey said lands to said children, or to account for and pay over to them all of said trust fund, with the rents, profits and interest accrued thereon. Appellee's wife, the trustees of the land conveyed for her use, and certain mortgagees of other portions are charged with notice of complainant's rights and made parties defendant.

Appellee Reed, by his answer, denied the alleged trust, claiming that the money he received was given to him absolutely by her, and also set up the statutes of frauds and of limitations. The other defendants denied all notice of complainant's claims before they took their respective deeds or mortgages and that they were made without valuable consideration.

On final hearing upon the proofs taken under these pleadings, the court dismissed the bill at complainants' costs, and they appealed. Without now undertaking a full review of the evidence or the argument for appellants, we are of opinion, upon a full consideration of both, that this decree should be affirmed, upon the ground that there was no sufficient proof of any trust reposed in appellee Reed in connection with the moneys in question.

There was none whatever of any such understanding as was alleged. The nearest approach made to it was by the testimony of two of the complainants, that they heard their mother say, long after the money had been received or applied, and in the absence of their father, that some of it had

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gone into the home place, and that the children ought to have a share of it, and that she wanted them to have it; and the statement of one Mrs. Hembraugh, that her father, in talking with her about his intention to marry again, said he wanted to know what they thought about it; that she told him if he would wait long enough it would make no difference to them, and he said, referring to the home property, that before he married he would make satisfactory settlement with the children; which last statement he denied. This is not urged as satisfactory proof of the alleged understanding between him and his deceased wife. The reliance is rather upon a supposed resulting or constructive trust.

It appears that in October, 1865, she applied upon two promissory notes made by him and then belonging to her father's estate, the sum of \$4,870.51, coming to her from that estate. It was paid to her by the executor, by surrendering to her one, receipted as paid in full, on which was due \$3,024.33, and indorsing on the other, by her direction, a credit of the balance, \$1,797.48. These notes had been given on the 18th of February, 1858, to W. G. Gallagher, in part payment for the home farm then deeded to him, and were assigned to her father. The one so paid she delivered to her husband, and he afterward paid with his own means the balance remaining due on the other and took it up. It does not appear that appellee was present or had anything to do with this arrangement and transaction with the executor, or that he requested, suggested or expected it. The money having been thus voluntarily applied by her, and toward payment for land long before purchased by and conveyed to her husband in his own name, it is not claimed that a resulting trust would arise thereon as to that land; but counsel "insist that in equity it should be held to create a lien upon it, in the nature of a vendor's lien." On what principle it should be so held is not suggested, and we think of none unless it be that the application of this money was not made by her voluntarily, but to protect her contingent right of dower in the premises, and therefore she should be subrogated to the creditor's security, which was a vendor's lien reserved by the deed; for it is clear she could not make her husband her debtor without

his consent by the voluntary payment of his debt to another. But if the facts showed a right to such subrogation, which we do not concede, this is not a bill to enforce a lien of any kind, and however clear the right to such relief it could not be properly granted in this case.

The responsibilities of a trustee, whatever be the kind of trust, are either contractual or penal. In other words, they arise only out of some act of the party to be charged, which expresses or implies his acceptance of them, or some default, fraud or wrong which makes it equitable that he should bear them without regard to his consent. But all the acts out of which any trust in appellee in connection with this money is claimed to have arisen, were shown to have been those of his wife alone, without so much to implicate appellee as his consent to or knowledge of them. Of themselves these facts indicate that the money so applied by herself was absolutely given to him or for his benefit. They relieved him from the necessity of making any proof to that effect. He had no presumption of agency on his part to rebut, as he would in case of a showing simply that he collected or received it as hers, though with her consent, from a debtor or custodian. Had she been any other than his wife the law would presume from these facts that it was a gift; and for any return therefor she must look to his sentiments and not to any obligation that a court can enforce. The distinction between receiving it from a third party, as hers, and receiving it from herself, bears on the pertinency of the principal authorities cited. *Patten v. Patten*, 75 Ill. 446; *Tomlinson v. Matthews*, 98 Id. 178; *Perry on Trusts* (3d Ed.), Sec. 666.

It further appears that on May 8, 1867, Mrs. Reed with her husband conveyed certain land devised to her by her father to her brother, for \$7,000, of which \$1,000 (less the amount of a succession tax deducted) was paid in cash, and the residue in a note for \$2,000 at sixty or ninety days, and another for \$4,000 at five years. The cash was paid to her, and the notes were made payable and delivered to her. What disposition was made of this money and these notes was shown only by the testimony of Mr. Reed himself, who was called as a witness by the complainants. He stated that of the cash he paid

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\$500, by her direction, to the Church Extension Society, and the rest she expended herself in furnishing their house and getting other things she thought necessary. The \$2,000 note was indorsed and delivered by her to him. He left it at the bank, drew the money when it was paid, and put it into what he called the "general fund," that is, "with what he made on the farm and what she got," which fund they used for whatever they needed; and that he used this money, as she knew he would, in providing for the family and in his business, but just how, particularly, he could not remember. The other note she indorsed to the order of Robert Morrison, and delivered to her husband to be used by him, together with money of his own, to pay said Morrison for a lot of cattle purchased of him during that fall. Buying, feeding and selling cattle was his business. He sold that lot at a considerable loss, but with what he got for it he bought another, and so on. When first examined for the complainants he said his recollection then was that the money he got for the second bunch, after the Morrison lot, was used, with other means, in the purchase of a certain piece of land described—taking the deed to himself—which land he still holds. Afterward he corrected that statement, and having refreshed his memory from the deed and from his bank book and other papers, stated that he paid for that land before he realized on the sale of that bunch.

But whether the proceeds of this \$4,000 note or any part of them went into that land or not we think is immaterial, because it does not appear to us that they were received by him upon any trust whatever. The note was hers, and so made that she could control it and dispose of it as she should think proper. She could withhold it from her husband, or give it or loan it, or intrust it to him for her own or any other lawful use. When she indorsed it she knew the use to which it was to be put was speculative and hazardous, and that knowledge raises a presumption that it was not delivered to him in trust, to be safely kept and returned. Knowing it, she could not have complained of any loss suffered by the trade; but we apprehend, that under such a trust as is charged in the bill, her husband would have been liable for all loss, and also

accountable for all profit by it. We think it apparent that no such liability was contemplated in this transaction. Nor is there an intimation in the bill or testimony that he was her agent, to do business with her money for her, and at her risk of legitimate loss in such business. She herself delivered the note to him, to be used in a particular trade, as of his own proper business, for the benefit of himself and the family, and subject to the risks of the trade, precisely like the other money he put into it.

Nor was there about it any of the *indicia* of a loan. No security or evidence of indebtedness was taken, nor anything said or done to distinguish it from an absolute gift—as in the case of the moneys first above mentioned—coming from the executor of her father's will. She herself having possession and control of this note, applied it to his use in his business. The application of those moneys indicates her intention with respect to this. It came to her as her separate estate, but she did not intend to keep it as such. She voluntarily divested herself of it, and incorporated it in his. She lived with him as his wife for sixteen years after the delivery of these notes to him, and until her death, and yet there is no evidence that she ever asked him for an account, or in any act or word treated him as her trustee, agent or debtor, but always and only as her husband. And although the statute has abrogated the common law rights of the husband in respect of the property of the wife, nevertheless, as the court said in *Patten v. Patten*, *supra*, “the relation of the parties may be considered with reference to the weight to be given or inference drawn from their conduct and dealings with regard to her separate property.”

In addition to the circumstances shown, we have the positive testimony of the appellee, called as a witness by appellants, that none of this money was received by him under any trust, to account for or return it to his wife or her children, but all was given by her to him freely and absolutely; and his testimony stands without contradiction. Such a trust as is here charged should be established by clear and satisfactory proof.

We think the decree dismissing the bill was right, and it will be affirmed.

Decree affirmed.

LUCINDA D. WHITTAKER, EXECUTRIX,
v.
CROW, HARGADINE & Co.

Negotiable Instruments—Note—Statute of Limitations—New Promise—Interest.

1. Where indorsees of a promissory note, on which the statute of limitations had run, indorsed upon its back an agreement to accept a sum less than the amount for which it was given, in full satisfaction thereof, during the current year, and the maker wrote below, "I accept the above condition," and signed his name, this court holds that the act in question constituted a valid contract on which an action would lie at its maturity.

2. Interest at six per cent (the original note providing for interest at ten per cent) should be allowed after the maturity of the new contract.

[Opinion filed November 23, 1889.]

IN ERROR to the Circuit Court of Pike County; the Hon. C. J. SCOFIELD, Judge, presiding.

Mr. JAMES E. McMURRAY, for plaintiff in error.

The new promise to pay, to be sufficient to remove the bar of the statutes, must be absolute and unqualified, and is not to be extended by implication or presumption beyond the express words of the promise. *Kimmel v. Schwartz*, Breese, 218; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Parsons v. Northern Ill. Coal and Iron Co.*, 38 Ill. 430; *Carroll v. Forsyth*, 69 Ill. 127; *Wachter v. Albee*, 80 Ill. 47.

An offer to pay a less sum than the amount due, made by a debtor in whose favor the statute had run, will not remove the bar, unless accepted at the time when made. *Wood on Limitations*, p. 190; *Lawrence v. Hopkins*, 13 John. 287; *Bell v. Morrison*, 1 Pet. (U. S.) 351; *Parsons v. Northern Illinois Iron and Coal Co.*, 38 Ill. 430; *Slack v. Norwich*, 32 Vt. (3 Shaw) 818; *Batchelder v. Batchelder*, 48 N. H. 23; *Smith v. Eastman*, 3 Cush. 355; *Munford v. Freeman*, 8 Met. 432.

An agreement to accept a less sum than the amount due is

a *nudum pactum*. Heathcote v. Crookshanks, 2 Term R. 24; Dederick v. Leaman et al., 9 Johns. 332.

Mr. J. S. IAWIN, for defendants in error.

We both agree that an offer, unaccepted, is not binding; but if accepted absolutely and unconditionally becomes a contract. Addison on Contracts, Sec. 20. The question then to be determined is, does the indorsement on the note, of date March 20, 1885, amount to an offer, and an absolute and unconditional acceptance.

Interest should have been allowed. Laws of 1857, Sec. 1; R. S. 1874, Sec. 4, Chap. 74; Brockman v. Sieverling, 6 Ill. App. 513; Norton v. Colby, 52 Ill. 198; Marshall v. Tracy, 74 Ill. 379; Chitty on Contracts, 821a, n. 1.

The Circuit Court had the right to classify the claims. Darling v. McDonald, 101 Ill. 370; McCall v. Lee, 120 Ill. 261.

The Appellate Court has the power to correct the judgment by the allowance of interest. Starr & Curtis' R. S., Chap. 110, Sec. 82; Masters v. Masters, 13 Ill. App. 611; Church v. Jewett, 1 Scam. 55; Peck v. Stevenson, 5 Gilm. 127; Welch v. Wallace, 3 Gilm. 490.

WALL, J. It appears from the record that A. S. Whittaker made his promissory note to Crow, McCreery & Co. for \$789.50, payable December 20, 1874; that no payment was made thereon within ten years after maturity; that Crow, Hargadine & Co. became the holders by indorsement, and that after the statute of limitations—ten years—had fully run, the following proposition and acceptance were written on the back of the note.

"We agree to accept five hundred dollars in full satisfaction of within note during 1885.

"CROW, HARGADINE & CO.

"I accept the above condition.

"A. S. WHITTAKER.

"St. Louis, March 20, 1885."

The question is, what legal significance is to be attached to these entries? Plaintiff in error urges that the holder of the

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note merely proposed to accept the sum mentioned within the time mentioned, but that the debtor while accepting the condition did not bind himself to pay. If so, then the offer of the creditor was without consideration and not binding on him, and therefore nothing obligatory was effected on either side. We think, however, the parties intended to contract, and did contract, the one to pay and the other to receive, and that, upon the maturity of the contract thus made, an action would lie by the promisee against the promisor. In substance it was a new contract by the debtor based on the moral consideration of the old debt to pay the sum agreed on within the time fixed, and it was a surrender on the part of the creditor of all other demands growing out of the former liability. If this be the correct view it follows that the defendants in error were entitled to an allowance for the principal sum thus promised, which was granted by the Circuit Court, and as the contract was in writing interest also was allowable after maturity.

The cross-errors assigned are upon the failure of the court to allow such interest. This point is well made. The judgment will be reversed upon cross-errors and the cause will be remanded with directions to allow interest at six per cent after maturity of said new contract. The defendants in error will recover their costs herein.

Reversed and remanded with directions.

 NORTHWESTERN LIFE ASSOCIATION

v.

RACHEL STOUT.

Life Insurance—Plea to Jurisdiction—Demurrer—Matters of Fact, How Presented—Insurance Companies, What Are—Construction of Statutes.

1. Upon hearing on a demurrer to a plea to the jurisdiction, the plaintiff is bound by the material averments of the declaration, but not so the

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defendant, further than they are admitted by the plea. If any matter of fact contained in the plea is to be denied, or if there is any matter of fact that in law would avoid the *prima facie* effect of the plea, it should be presented by replication, whatever may appear in the declaration.

2. In an action brought upon a certificate issued by a mutual benefit association, defendant filed a plea to the jurisdiction, alleging "that it is, and at all times since its organization has been, an association intended to benefit widows, orphans, heirs and devisees of deceased members thereof, and no annual dues are required and the members receive no money for profit or otherwise, that the location and principal place of business of the said association is, and ever since the organization thereof has been in the city of Bloomington, in the said county of McLean, and not at any time in the said Greene county," and that the defendant had not been served with process in Greene county, but had been served in McLean county: *Held*, that the plea should have been held good on demurrer.

3. In the case presented, this court holds that the plea was sufficient to bring the defendant within the meaning of Sec. 31 of the Act concerning corporations, and to show that it was therefore not to be deemed an insurance company within the meaning of Sec. 3 of the Practice Act, providing that the Circuit Court of the county where the plaintiff resided should have jurisdiction of all actions to be commenced against any fire or life insurance company.

[Opinion filed November 23, 1889.]

IN ERROR to the Circuit Court of Greene County; the Hon. C. EPLER, Judge, presiding.

MESSRS. KERRICK, LUCAS & SPENCER, for plaintiff in error.

Section 31 of the act concerning corporations is a complete answer to the claim that plaintiff in error is an insurance company. See *Commercial League v. People*, 90 Ill. 171; *Catholic Congregation v. Germain*, 104 Ill. 445; *C. M. & St. P. R. Co. v. Dumser*, 109 Ill. 410.

In the case of *Ottawa Gas & Coke Co. v. Downey*, 20 N. E. R. 122, Wilkins, J., says: "Courts can not, as a general rule, disregard the plain language of a statute. It is their duty to accept it as they find it, and to enforce it as plainly written." *Cooley*, Constitutional Limitations, 55; *Foley v. The People*, Breese, 57; *Railroad Co. v. Dumser*, 109 Ill. 402; *Newell v. The People*, 7 N. Y. 9.

The same rule is laid down in *Potter's Dwarries on Statutes*, etc., 189.

"It is the right of a party to be sued in the county where he resides, and to have his cause tried there, and he ought not to be denied that right—a right to him in many instances of the utmost importance—by any technical and metaphysical learning in regard to pleas in abatement." Scott, J., in *Humphrey v. Phillips*, 57 Ill. 135. See, also, *Drake v. Drake*, 83 Ill. 528.

The plea is in proper form. *Nixon v. S. W. Ins. Co.*, 47 Ill. 444; *Nispel v. W. U. R. R. Co.*, 64 Ill. 311.

Mr. JAMES R. WARD, for defendant in error.

With courts of general jurisdiction the presumption is that they are in the proper exercise of jurisdiction until the contrary is shown. A plea to the jurisdiction of the court must aver facts showing the absence of jurisdiction, and must be certain in every particular. *Diblee v. Davison*, 25 Ill. 488; *Kenney v. Greer*, 13 Ill. 447.

From the earliest period in the history of the common law, pleas in abatement have not been favored by the courts, and hence great precision has been required, both in the substance and structure of such pleas. *Nixon v. Ins. Co.*, 47 Ill. 446; *Parsons v. Case*, 45 Ill. 296; *Feasler v. Schriever*, 68 Ill. 323.

The plea to the jurisdiction is defective. It does not contain the averment that plaintiff in error is not an insurance company, as described in the declaration. It does not contain facts showing how the association is "intended to benefit the widows, orphans," etc., and that the association does not, by transacting an insurance business, but by constructing and operating railroads or bridges accomplish that purpose, to distinguish it from such corporations, so that in no event could the Circuit Court acquire jurisdiction under Secs. 2 or 3 of the Practice Act. *F. & M. Ins. Co. v. Buckles*, 49 Ill. 483. The reasoning in this case is applicable to the one at bar. It must negative all the facts upon which jurisdiction might depend. *Lord v. Babel*, 16 Ill. App. 434.

The plea is inaccurate and lacks precision in substance in another respect. It does not contain all the averments necessary to bring the plaintiff in error within Sec. 31 of the

act cited by counsel. Associations, etc., that shall not be deemed insurance companies, under that act, are associations and societies which are intended to benefit the widows, orphans, heirs and devisees of deceased members thereof *and members who have received a permanent disability*, and where no annual dues *or premiums* are required, and whose members shall receive no money as profit or otherwise, *except for permanent disability*. The words italicized are found in said Sec. 31, but are not found in the plea to the jurisdiction. The plea is fatally defective in not containing the averment that no premiums are required. *Com'l League v. People*, 90 Ill. 171; *Golden Rule v. People*, 118 Ill. 497.

It may all be true, as alleged in the plea, that no annual dues are required, yet, if premiums are required, the association is not within the protection of that section. An averment in pleading will be taken most strongly against the pleader, especially in pleas of abatement. *Henkel v. Heyman*, 91 Ill. 97; *Bourland v. Sickles*, 26 Ill. 499; *Feasler v. Schriever*, 68 Ill. 323.

To avail of a statute, the pleader must bring himself clearly within its terms and spirit. *Williams v. Hogan*, 46 Ill. 508.

Where the clause of the statute relied upon contains exceptions or terms in the nature of exceptions, the pleader must show affirmatively that the case does not fall within any of them. *T. P. & W. R. R. Co. v. Pence*, 68 Ill. 525.

PLEASANTS, P. J. This was an action of assumpsit brought by defendant in error in the Circuit Court of Greene County, upon a certificate issued by plaintiff in error stating, in substance, that John H. Stout was entitled to all the rights and privileges of membership in the association, and to participate in its beneficiary or relief fund to the amount of \$2,000, which sum, or such part thereof as may be collected as specified in the constitution and by-laws of the association, should, within sixty days after his death and upon the condition therein mentioned, be paid to his wife, the defendant in error, which was dated and purported to be executed at Bloomington, Illinois. The declaration averred that the defendant was

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a body corporate, existing and "doing a life insurance business" under the laws of this State; sets forth the certificate *in hæc verba* with what purported to be the constitution and by-laws, counted on it as a "policy of insurance," and alleged the other facts required to fix the liability claimed. The summons was directed to, and served and returned by the sheriff of McLean county.

Thereupon the defendant, by its attorney in fact, filed a plea to the jurisdiction of the Circuit Court of Greene County, averring that the defendant "is a corporation aggregate, organized under an act of the General Assembly of the State of Illinois, entitled "an act concerning corporations;" that it is, and at all times since its organization has been, an association intended to benefit the widows, orphans, heirs and devisees of deceased members thereof, and no annual dues are required, and the members receive no money for profit or otherwise. * * * That the location and principal place of business of the said association is, and ever since the organization thereof has been in the city of Bloomington, in the said county of McLean, and not at any time in the said Greene county; and that the defendant, nor its president, nor any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent or any agent of said association was found or served with process in the said action in the said county of Greene, but was found and served with process in said action in the said county of McLean." To this plea the plaintiff demurred "specially," assigning the following causes: "1st. The plea is not sufficient in law. 2d. The plea is in conflict with matters set forth in the policy, constitution and by-laws set forth in the declaration. 3d. The plea presents an objection which, by the provisions of the by-laws set forth in the declaration and the law, the defendant is stopped from making in this court." This demurrer was sustained, and the defendant abiding by its plea, a judgment by *nil dicit* was entered for the plaintiff for \$2,000 damages assessed and the costs.

We presume the causes secondly and thirdly assigned for the demurrer are abandoned, as they are not urged in the

argument here. And obviously the matters therein respectively set forth are not available on this demurrer. The plaintiff may be bound by the material averments in the declaration, and therefore she could not claim, as against the plea, that for aught it shows this might be a local action, since the declaration conclusively shows it is not. *Humphrey v. Phillips*, 57 Ill. 137. But the defendant is not so bound, further than it admits by the plea; and the plea here admits none of them, either expressly, or by implication from the denial of some. It presents only matters of fact which do not appear in the declaration, as the basis of its contention thereon, that whatever the declaration may contain, and whether true or false, the Circuit Court of the county in which the action is brought should not take cognizance of it. If any allegation of fact material to the support of this contention is to be denied, or if there is any matter of fact that in law would avoid the *prima facie* effect of the plea or estop the defendant from making such allegation, whether it appears or does not appear in the declaration, it should be presented by replication. The record shows that the court below ignored these causes, and sustained the demurrer upon the finding that the plea was "not sufficient in law." That was a finding as upon a general demurrer. Its soundness is the only question here argued or really in the case. The substantial defect alleged against the plea is that it fails to bring the defendant within the terms or meaning of the statute relied on, or to show that it is not a life insurance company within the meaning of Sec. 3 of the practice act. By the second section of that act it is declared to be unlawful to sue any sole defendant in a transitory action out of the county where such defendant resides or may be found. A later act, approved April 3, 1873, and now arranged as Sec. 3 of the practice act, provides that "the Circuit Court of the county wherein the plaintiff or complainant may reside shall have jurisdiction of all actions hereafter to be commenced by any individual against any fire or life insurance company." Under that provision this action was brought.

In 1869 the legislature provided by separate acts for the

incorporation and regulation of fire and life insurance companies, respectively, which acts, with the amendments made from time to time, have ever since been in force and constituted the 73d chapter of the Revised Statutes. They define the powers, duties and liabilities of such companies, and regulate the business in this State of those exercising like powers under the laws of other States and countries.

By an act approved April 18, 1872, entitled "An act concerning corporations," the legislature authorized the formation of corporations for any lawful purpose, except banking, insurance and some others specified, for which provisions were made by other acts. It classified them as corporations for pecuniary profit, corporations not for pecuniary profit, and religious corporations, and prescribed the proceedings for their incorporation and defined their powers, rights and duties, respectively; and by an amendment of May 22, 1883, (L. 1883, p. 74) the 31st section, relating to corporations not for pecuniary profit, was made to declare that "associations and societies which are intended to benefit the widows, orphans, heirs and devisees of deceased members thereof, and members who have received a permanent disability, and where no annual dues or premiums are required, and where the members shall receive no money as profit or otherwise, except for permanent disability, shall not be deemed insurance companies."

Whether the associations and societies here described are or are not, in fact, in any sense insurance companies, is immaterial. The legislature could not change the fact by declaring them to be or not to be such. Nor has it assumed to do so, but simply declared they shall not be "deemed" such. That declaration is not limited or qualified in any way, and can mean nothing else than that they are not to be held subject to any law that is specially and peculiarly or exceptionally applicable to insurance companies. From the language employed this is plain, beyond dispute, or any qualification by construction. No judicial decision is required to establish it, but it is so assumed and held by the Supreme Court throughout the cases of the Commercial League v. The People, 90 Ill. 166, and the Golden Rule v. The People, 118 Ill. 497.

Appellee "deemed" appellant an insurance company. By this action she sought to have it subjected to a law specially and exceptionally applicable to such companies, by suing it alone in a transitory action in the county of her own residence, which was not the county where it resided or was found; and the question is whether the averments of the overruled plea fairly brought appellant within the description of associations and societies which the statute declares shall not be so deemed.

Appellee insists it fails in that it does not aver that no "premiums" are required; in that it does not include in the averment of those intended to be benefited "members who have received a permanent disability;" and in that it does not add the exception "for permanent disability" to its averment that the members receive no money for profit or otherwise.

Counsel hold the phrase "no annual dues or premiums," to mean no annual dues or any premiums; and hence, that though no annual dues be required, yet, if any premiums are, the association is not within the protection of the statutes. We think not. For a valid contract in the nature of insurance, to benefit the widow of a deceased member or anybody else, there must be, as for all other contracts, a consideration. This statute, in allowing such a contract, must therefore have intended to allow a consideration for it, and the definition of "premium," as used in the law and business of insurance, is "the consideration for a contract of insurance." See Bouvier's Dictionary; also Webster's. Whether called an initiation fee, an admission fee, or by any other name, this consideration is none the less strictly a "premium." Bouvier further says—which is also matter of general knowledge—that "in life insurance the premium is usually payable periodically," citing 18 Barb. 541; and we have no doubt it was in view of this known usage of insurance companies, organized for profit, that the legislature employed the term "annual" to qualify both "premiums" and "dues." Annual dues on any account which, being annual, could not be limited to the expenses of the association, would be likely to produce a surplus, to be divided or invested, and thus make a profit for the members, which the

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statute was designed to prevent. We are further of opinion that annual premiums "required" would be annual dues; that if these terms are not here used synonymously the one is to be regarded as generic and the other as specific; and in either case the averment that no annual "dues" are required would be sufficient. So we understand the case of the Commercial League v. The People, *supra*. There it appeared that an initiation fee of \$50 and an advance assessment of \$10 were required as the cash or executed part of the premium, but this requirement did not exclude the company from the protection of the statute; and in reference to dues thereafter to accrue for benefits and expenses—being the executory part—the saving point made was that they were not annual. The court say: "There is nothing in this by-law which requires the payment of annual dues or premiums. No sum whatever is required to be paid by the members annually." Thus apparently treating premiums as dues, and the term annual as qualifying both.

Authority to provide for widows, orphans and other classes mentioned, is authority to provide for all, or any, or either of such classes. The statute does not make provision for all of them the condition of the immunity here claimed, but gives authority to provide for all, or for any less than all, with the immunity upon other conditions expressed, which are, that no annual dues shall be required, and that members shall receive no money for profit or otherwise, except for permanent disability. The plea avers, in effect, that the defendant has not only fully complied with these conditions, but has done so without availing itself of the exception made in its favor, and designates the classes it is intended to benefit, which appear to be no other than those, though not all of those designated by the statute; in other words, that it has done all it was required to do, and more, in performance of the conditions, and exercised no other privileges than those granted, though not all of those granted, upon those conditions. We think those averments, if true, entitle it to whatever immunity is afforded by the amendatory act of 1874.

It is insisted, however, that it does not afford the immunity

here claimed; that it does not change or modify the provision of the act of 1873 (Sec. 3 of the Practice Act); that these two acts are not *in pari materia*, and therefore not to be construed or considered together; that so to construe or consider them would necessarily make the act of 1874 void under that part of Sec. 13, Art. IV of the Constitution, which provides that "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title," and that "no law shall be revived or amended by reference to its title only, but the law revived or the section amended shall be inserted at length in the new act;" and that, unless so construed or considered, the jurisdiction conferred by the act of 1873 remains unimpaired.

If these premises were granted the conclusion sought to be drawn, that the jurisdiction assumed by the court below in this case was rightful, would not necessarily follow. That would still depend on the question whether this defendant was rightly deemed an insurance company—a question on which these legal propositions throw no light.

The act of 1874 does not amend nor purport to amend the practice act. It amends the act of 1872 "concerning corporations." Sec. 3 of the Practice Act remains in full force and the Circuit Courts still exercise all the jurisdiction it confers. Nor is its meaning at all uncertain. The uncertainty, if any, is in the character of this company, whether it is or is not such as brings it within the designation of the act. Nobody holds the meaning of the statute against larceny uncertain, and yet in a given case it may be very doubtful whether the subject of the alleged larceny is personal property. In such case we must go for a definition of the subject or object designated, wherever we can find it, whether to another statute or to a popular dictionary. We are not confined to amendatory acts and statutes *in pari materia*. In this case the plaintiff was obliged to go outside of the practice act to ascertain whether defendant was an insurance company; and by reference to text books, statutes, and whatever else was thought to show the general understanding of what constituted such a company, and by com-

I. C. R. R. Co. v. Fishell.

parison of the features and operations of the defendant with those of companies which were understood to be such, reached the conclusion that it was, and therefore subject to the plain and certain provision of Sec. 3. Defendant, with the same object in view, finds another statute, describing specifically and precisely the features and functions which it claims for itself, and expressly declaring that companies having those features and functions shall not be deemed insurance companies. Whether this statute is or is not amendatory of or *in pari materia* with the third section of the Practice Act, is not a material question here. It is an authoritative dictionary for this case and settles the question presented by the demurrer.

For these reasons the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

ILLINOIS CENTRAL RAILROAD COMPANY

V.

DANIEL FISHELL.

Railroads—Injury to Team—Crossings—Village Ordinance—Rate of Speed—Contributory Negligence—Evidence.

1. In an action against a railroad company for damages to a team at a crossing in a village in which the negligence charged is a violation of an ordinance as to speed, a stipulation that the ordinance put in evidence "was duly certified under the seal of the corporation, as required by law," and that it was "duly passed and published as required by law," avoids the necessity of further proof that the ordinance was in force.

2. The failure of plaintiff to stop and look and listen before going upon the track at the time of the accident can not be said, under the circumstances of the case presented, to constitute negligence as matter of law.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Champaign County; the
HON. C. B. SMITH, Judge, presiding.

Mr. J. S. WOLFE, for appellant.

Plaintiff averred the use of due care and must prove the averment. I. & St. L. Ry. Co. v. Evans, 88 Ill. 63.

It is gross negligence to go upon a crossing without looking for a train. C. & A. R. R. Co. v. Robinson, 8 Ill. App. 140.

Duty of plaintiff to use care is not diminished because of the obstruction caused by the cars on the side track. This obstruction suggested greater vigilance. Garland v. R. R. Co., 8 Ill. App. 578.

On coming to the crossing it was plaintiff's duty to look in either direction. R. R. Co. v. Miller, 76 Ill. 280; 2 Am. & Eng. R. R. Cases, 121.

Traveling with a wagon, must stop, look and listen. 2 Am. & Eng. R. R. Cases, 191, 202; 6 Am. & Eng. R. R. Cases, 38. And failure to give signals does not excuse this omission. 2 Am. & Eng. R. R. Cases, 220; 6 Am. & Eng. R. R. Cases, 27.

If there is obstruction to sound or vision, must stop and look and listen. 6 Am. & Eng. R. R. Cases, 268.

Mr. FRANCIS M. WRIGHT, for appellee.

PLEASANTS, P. J. This suit was brought for damages to appellee's wagon, load, and one of his horses, by appellant's train, on a crossing of its track in the village of Ludlow; judgment for \$116.

The negligence charged in the declaration was the running of the train at a greater rate of speed than was allowed by the village ordinance therein set forth, which was ten miles per hour between the cattle guards, and fifteen outside of them, in said village. It was between the cattle guards that the collision occurred; and while the evidence as to the speed of the train was conflicting, there was clearly enough for the plaintiff to support a finding that it greatly exceeded the limit so prescribed. In that case the statute makes the railroad company "liable to the person aggrieved for all damages done" thereby to his person or property, and declares that "the same shall be presumed to have been done by the negligence of the corporation or their agents." Hurd's R. S., Ch. 14, Sec. 87.

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It is said that the ordinance alleged was not shown to have been in force, and that this allegation was material and proof of it indispensable; citing C. & A. R. R. Co. v. Engle, 76 Ill. 317. That was a case like this, and it was there held that the ordinance was not shown to have been "in force" only, because there was no other proof of its "publication" than the certificate of the town clerk, which the statute did not make competent evidence of the fact. But since in this case there was a stipulation that the ordinance put in evidence "was duly certified under the seal of the corporation, as required by law," and that it was "duly passed and published, as required by law," we do not understand the ground of the objection.

It is further urged that plaintiff's own negligence in driving upon the track as he did, should bar a recovery. The only evidence upon that point is that of the plaintiff himself. His wagon was loaded with corn. He was walking on the south side of it, driving east, and the train came from the north. On the west side of the track were some cribs and bins, and also a side track which was occupied by cars up to the crossing, two blocks north. The substance of his testimony is that he was a farmer, living in the neighborhood; that Ludlow had been his market for years; that he was well acquainted in the village and familiar with the crossings there; that on the occasion in question he looked and listened for trains before going on the track; that he bent down and looked under his wagon, as far as he could, but his view was obstructed by the cars on the side track; that he tried to see and hear all he could, but everything was still and he went on; that he did not stop and go to the track to look, and that he saw nothing and heard nothing to warn him of the train until it whistled, when he was on the track. His language being that he "could" not hear, counsel infer it must have been because he was deaf or prevented by the noise of his wagon on frozen ground—more probably the latter—in which case ordinary care required that he should stop in order that he might hear. The inference may be just and it may not be. According to a common use he might as well be understood,

from that form of expression in reference to the subject-matter, to mean that, under the actual conditions, he expected to hear the sound of the approaching train if it was near enough to forbid an attempt to cross and coming as it ought to come, and that he "did" not hear it. That understanding would be further warranted by his statements—"the road was rather smooth right there" and "everything was still, and (therefore) I went across."

If he did so mean and his statement was true it can not be held as matter of law that his failure to stop was negligence. *Garland v. C. & N. W. R. R. Co.*, 8 Ill. App. 581; *C., St. L. & P. R. R. Co. v. Hutchinson*, 120 Ill. 587; *Pennsylvania Co. v. Frana*, 112 Ill. 398. It is a question of fact, into the consideration of which the experience and observation of jurors, apart from the evidence, must necessarily and largely enter. They thus know that even very careful persons of unimpaired senses, in approaching railroad crossings in villages, towns and cities, very commonly, if not as a rule, do not stop to hear, unless they actually do see or hear indications of an engine or car also approaching, and so near or in such manner as to make the attempt to cross apparently in some degree hazardous. They take care to have their horse or team under such control as to be able to stop instantly at will, and they look and listen; but go on, looking and listening as they go, unless arrested by some sensible indication of danger. This they do, notwithstanding the noises of the town, or the obstructions to sight by standing cars or otherwise; and if the trains moved as slowly as they ought, with the proper signal by bell, there would be no danger from them to drivers of average sight and hearing, using this degree of care, except from pure accident.

We think the plaintiff's statement on the whole fairly tended to show he recognized the crossing as a place of danger and approached it as such, and that he used ordinary care for the safety of his property.

It may seem incredible to counsel that he did not, without a want of such care, fail to know the train was coming until he was on the track, and yet too late to avoid the collision; but

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without knowing more than the record discloses of the conditions and circumstances, we can not overrule the conclusion of the jury, based as it must have been on their belief of his statement. They must have found he was not chargeable with any negligence, contributory or other; that he made a *prima facie* case, and did not himself rebut it. The views here presented and these findings meet the objections urged to the instructions. The judgment is affirmed.

Judgment affirmed.

JOHN HILLIGOSS

V.

J. E. GRINSLADE ET AL.

82	45
92	*504

Municipal Corporations—Village Trustees—Power of President and Trustees to Determine the Election and Qualifications of Members—Chancery Jurisdiction.

1. Upon a bill in chancery filed by three village trustees to prevent another from exercising the functions of such office, it is *held*: That the evidence failed to support the allegations of the bill; and that the bill failed to present grounds for equitable jurisdiction.

2. Where, by express statutory provision, the president and trustees of a village are vested with the power to judge of the election and qualifications of their own members, the exercise of this power is one of the public duties of the board, and chancery will not interfere therewith where no property rights, strictly considered, are concerned.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Moultrie County; the Hon. E. P. VAIL, Judge, presiding.

Messrs. SPITLER & HUDSON and F. M. HARBAUGH, for appellant.

Messrs. MILLS BROTHERS, for appellees.

WALL, J. This was a bill in chancery by the appellees,

who were three of the trustees of the village of Dalton City, against the appellant, to prevent the latter from exercising the functions of trustee of said village upon the main alleged ground that he was not legally elected.

It was averred that at the special election to fill a vacancy, which was the election in question, held August 28, 1888, one Kennedy received thirty-six votes and the appellant received thirty-seven votes, but that of the votes so received by appellant two were cast by persons not entitled to vote. It was averred that a petition had been presented to the board, composed of the president and trustees of the village, setting forth the said illegal votes and the consequent election of Kennedy, and praying that the board would investigate the matter; [that the board had not yet canvassed the returns or declared the result of the election, and that appellant had pretended to take the oath of office and was claiming the right to exercise the functions of trustee; that the president of the board was illegally recognizing appellant as a trustee, and that appellant acting with the president and two other trustees would constitute a majority, and that there was danger that they would grant license to sell intoxicating liquors within said village, to the irreparable injury of the village and of the inhabitants thereof. A temporary injunction was prayed to restrain appellant from acting as such trustee until the board should canvass the returns. Such injunction was granted. A demurrer to the bill having been overruled the defendant (appellant) filed his answer in which he denied that he had received any illegal votes; denied that before the canvass of the returns a petition was presented to the board; alleged that the board had canvassed the returns and had declared him duly elected; and denied that he and other members of the board were about to or would grant license to sell liquors within the village. The cause having been heard the court made the injunction perpetual.

From a careful examination of the evidence, as contained in the record, we can not find any proof that a petition was presented to the board, as alleged in the bill, or that there was any proof whatever that the persons named in the bill as ille-

gal voters were such in fact. The record is barren of any proof on the latter point. As to the former we find in the verbal evidence an occasional reference to a petition supposed to have been before the board, and we find in the proceedings of the board that a motion was made to "table the petition in regard to the election," but there is nothing to indicate what the petition was for or what it contained—nor does it appear that any action was had on the motion.

We find also that at the same meeting of the board, which was held prior to the filing of the bill, a motion was made by J. E. Grinslade, one of the appellees, to "table the returns of the last special election" (the one in question); that the president overruled the motion and ordered the clerk to swear in the appellant, and that then the appellant came forward and took the oath of office, whereupon on motion the board adjourned. This meeting was held on the 13th of September, 1888, and all the trustees were present, and as appears from the record the meeting was "for the purpose of finishing up the business of the last adjourned meeting and to swear in the newly elected member of the board." We are at a loss to understand how the decree can be sustained upon the evidence. A fair construction of the proceedings of the board would seem to be that they considered the appellant duly elected. It was, perhaps, informal to permit the president to assume the power of overruling the motion, to table the returns and order the member sworn in, but the board evidently acquiesced in what was done by making no protest or objection. This occurred before the filing of the bill, and therefore at that time the board had taken such action as it deemed necessary.

Furthermore, as already stated, it did not appear what the petition was or that illegal votes had been cast for appellant.

It did appear, however, that in October, after the bill was filed, a meeting of the board was held, when resolutions were presented declaring that the votes referred to were illegal and that Kennedy was therefore elected. At this meeting there seems to have been some confusion and irregularity, and upon the passage of the resolutions the three appellees only

participated. This proceeding occurring after the filing of the bill and after the September meeting, amounted in substance, if it had any legal validity, to a reconsideration of the action of the board in seating the appellant at the September meeting, and to a declaration that there was illegality in respect to the two votes mentioned. Without adverting to the question whether, pending the suit, the board could take action which would affect the legal rights of the parties, we are of opinion that the passage of these resolutions, in the manner stated, does not furnish proof of the fact alleged in the bill that these votes were illegal. The bill alleged they were illegal and the answer denied this allegation. It was to be proved, therefore, by legal and competent evidence. Assuming, then, that the bill stated such a case as would move a court of chancery to action, the evidence wholly failed to support it and therefore the bill should have been dismissed. But the fundamental point is to be considered, whether the bill presents sufficient ground for jurisdiction in equity. By the statute under which the village is organized, the president and trustees of the village are vested with the power to judge of the election and qualifications of their own members. See paragraphs 35 and 192, Chap. 24, Starr & C. Ill. Stat. The jurisdiction to determine contests for seats in the board is thereby given to the board, and is primarily to be exercised by the board as an independent tribunal. *Linegar v. Rittenhouse*, 94 Ill. 208.

Whether this power of the board is exclusive, or whether the courts might, in proper cases, entertain *quo warranto* or *mandamus* upon questions arising in controversies regarding the right to a seat in the board, we need not determine or consider in the present case. It is enough to say the power is clearly vested in the board, composed of the president and trustees, and its exercise is one of the public duties of the board conferred by express provision of the statute, and is a power generally held and exercised by bodies having legislative functions. The rule is well settled that chancery will not interfere with the exercise of such duties and powers where no property rights, strictly considered, are concerned. It will not interfere

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in matters of a political nature or in matters involving merely the exercise of governmental or official functions, either in respect to the official himself or the body which recognizes or authorizes his action. Kerr on Injunctions, 1, 2; Sheridan v. Colvan, 78 Ill. 237.

In this instance the bill was not filed against the village trustees, nor did it profess to operate upon them, but the effect was to prevent one of their members from acting in discharge of his official powers, upon the ground that the board had not properly exercised its duty or power in the premises, and this was extended to and did operate upon the board, indirectly, at least, and was efficient to obstruct its free proceedings. It assumed to determine for the board whether it had properly exercised its power to judge of the election and qualification of its own members—an assumption quite inconsistent with the authority cited above, and if sustained, quite certain to embarrass and impede the board in discharging this function. It is in effect to supervise the board in the performance of this public duty.

We are of opinion, therefore, the bill contained no equity upon its face and presented no ground of jurisdiction in chancery. The decree will be reversed and the cause remanded with directions to dismiss the bill.

Reversed and remanded.

PRENTISS D. CHENEY, GUARDIAN, ETC.,

v.

HARRY W. ROODHOUSE.

32	49
59	125
32	49
84	661

Guardian and Ward—Guardian's Report—Form of—Interest—Rent—Growing Crops—Administrator's Right to Sell—Improvement of Ward's Estate—Negligence.

1. A guardian's report though not in precise form will be sufficient if it clearly shows the rights of the ward.

2. A guardian is not properly chargeable with interest after he has

tendered to the judge of the County Court the funds in his hands, and has been instructed to place the same in bank until further orders.

3. A guardian, by making repairs and improvements on his ward's lands without a previous order of court, does not lose the right to be repaid for them, but does assume the burden of showing, on application for credit therefor, that they were necessary and proper, to the interest of the ward, and paid for at reasonable rates.

4. Under Sec. 94, Chap. 3, R. S., an administrator is authorized to sell crops growing on his intestate's lands at the time of his death and apply the proceeds to the payment of decedent's debts.

5. In the case presented, sundry minor exceptions are overruled, the decree of the court below being supported by the evidence.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Greene County; the
Hon. G. W. HERDMAN, Judge, presiding.

Mr. T. S. CHAPMAN, for appellant.

Mr. MARK MEYERSTEIN, for appellee.

CONGER, J. Peter Roodhouse died intestate June 9, 1879, in Greene county, leaving him surviving Harriet Roodhouse, his widow, appellee, Harry W. Roodhouse, issue of a former marriage, and Benjamin T. Roodhouse, issue of his last marriage, his two sons and only heirs at law. Mrs. Roodhouse, together with appellee, became the administrators of the estate. In October, 1879, Mrs. Roodhouse, with her son Benjamin, removed to Washington, D. C., where they have since resided, leaving appellee to manage the administration of the estate, as well as the lands left by Mr. Roodhouse. On October 17, 1881, appellee was appointed guardian of his brother, and it is upon the settlement of his account as such guardian that this controversy arises.

Upon appellee's making his final report several exceptions were filed thereto, some of which were by the court below overruled, and some in part sustained, and which we will notice in regular order.

Appellee filed no report until appellant was appointed to succeed him, such report having been filed on the 16th of

Cheney v. Roodhouse.

January, 1888. And it is insisted by appellant that such report *in form* is radically wrong. That it does not, as it should, purport to show the balance in his hands at the end of one year after his appointment, and the balance in his hands at the end of each year thereafter.

The report is open to this objection, but it does show the entire amount collected and expended, and computes the amounts upon the principle of yearly rests, so that the rights of the ward are as fully protected as though such report had been made in proper form. It might have been proper in either the County or Circuit Courts to have required appellee to have complied with the suggestion made, but we are not inclined to reverse the case because the report may not be in form, if it can be ascertained that the rights of the minor have been fully set forth, and we think they have.

It is urged that the calculations of interest as set forth in the report, is a mere guess on the part of appellee, and the account does not furnish the *data* from which such calculations can be verified or refuted. This is an error, for we have taken the trouble to go through the account as presented in the record, each year by itself, and making rests at the end of each year as required by the rule of the Supreme Court, and the result is so near that shown by the report as filed, as to show that in principle they are the same, the difference being only such as would naturally arise in making so many calculations.

It is next insisted that the annual rent of \$900 as reported by appellee is too low, and should have been increased. We think the evidence shows that amount to have been just and equitable and think the action of the court in fixing the rent at that sum, was fully warranted by the evidence. It is true appellee at one time told Mrs. Roodhouse, he thought he could pay as rent for the land \$2,500, and for that year he did pay to her two-thirds of that sum, but he denies that he made any contract to that effect, but says it was only his opinion of the probable value of the rents before he had ascertained by trial, and in the absence of any contract the ward should recover only what would be a reasonable rent, and that we think he has done.

It is next made the subject of complaint that the Circuit Court did not require appellee to pay interest from January 16, 1888, to March 8, 1888; appellee on the former date tendered the money in his hands to the judge of the County Court, and was by him directed to place the funds in bank until further orders, and under these circumstances we see no impropriety in relieving him from the payment of interest while it was so held subject to the order and disposition of the court.

The fourth and fifth objections relate to the allowance by the court of certain items credited to appellee in his account, and of which we can not speak in detail without making the opinion too voluminous. We think the evidence fully justified their allowance.

By making the repairs and improvements on the ward's lands without a preceding order of the County Court, appellee did not lose the right to be repaid for them, but he did assume the burden of showing, at the time of asking credit therefor, that they were necessary and proper, to the interest of the ward, and paid for at reasonable rates. This, we think, appellee did.

The sixth objection as stated by counsel for appellant is: "All the crops growing and unmaturing on the lands of Peter Roodhouse at the date of his death, June 9, 1879, were immediately vested in his two sons as a part of his real property and the administrator had no rightful authority to appropriate the same." By Sec. 94 of Chap. 3, R. S., the administrator is expressly authorized to do what he did in the case at bar, viz.: as administrator of his father's estate he sold these growing crops as other personal property, and applied the proceeds toward the payment of the decedent's indebtedness.

The seventh and eighth objections are general complaints based upon the negligence and carelessness of appellee in failing to file an inventory of the ward's estate, in failing to make reports as he should, and in failing to loan his ward's money and rent his lands.

That appellee was guilty of great negligence in the performance of his duties as guardian can not be denied, but he

P., D. & E. Ry. Co. v. Powell.

has been punished for his failure to make an inventory and report by having his entire commissions as guardian, amounting to over \$600, taken from him, and he has been required to account for all moneys received, with six per cent compound interest with annual rests, and a rent upon the land fully as high as the evidence would justify, and we are at a loss to know what more should in these respects be required.

We will dispose of the remaining objections of appellant as well as the cross-errors assigned by appellee, by saying that after giving the whole record a careful investigation, we are satisfied that the decree of the Circuit Court is a fair and just settlement between appellee and his ward, and that neither party has any good reason to complain.

The decree of the Circuit Court will be affirmed.

Decree affirmed.

THE PEORIA, DECATUR & EVANSVILLE RAILWAY
COMPANY

v.

CASSIUS M. POWELL.

Railroads—Injury to Stock—Evidence—Verdict.

In an action against a railroad company for injuries to stock upon defendant's track, alleged to have been caused by the negligent management of one of its trains, this court declines to interfere with verdict for plaintiff.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Moultrie County; the Hon. E. P. VAIL, Judge, presiding.

MESSRS. STEVENS & HORTON and JOHN R. EDEN, for appellant.

MESSRS. MEEKER & GRIDER and J. E. JENNINGS, for appellee.

WALL, J. The appellee recovered a judgment against the appellant for \$160 for damage to stock. The negligence alleged was in the management of the train while the stock were on the track. It is insisted by the appellant that there was not sufficient evidence on the part of appellee to warrant the verdict. We have carefully read all the proof from the record and find it conflicting in some respects, and considered altogether, not entirely satisfactory, but it is not so deficient as to require a reversal upon that ground alone.

The instructions given for the appellant called the attention of the jury very pointedly to the issues and it can not be supposed the jury misunderstood the questions submitted for their decision.

It is objected that some of the special interrogatories were not properly or perfectly answered, but we think there is nothing substantial in the objection. No complaint is made upon the rulings of the court in the admission of evidence or in the giving or refusing of instructions.

Finding no tangible error in the record we must affirm the judgment.

Judgment affirmed.

DANIEL McLAUGHLIN

v.

FRANK R. FISHER.

Slander—Pleading—Actionable Language—Demurrer.

In an action for slander, this court holds that a demurrer to the declaration was properly sustained, the words charged not being actionable *per se* and no sufficient averments appearing to show that the same touched the plaintiff in "some office, business or employment."

[Opinion filed November, 23, 1889.]

APPEAL from the Circuit Court of Sangamon County; the Hon. J. A. CREIGHTON, Judge, presiding.

MESSRS. CONNOLLY & MATHER and JAMES M. GRAHAM, for appellant.

McLaughlin v. Fisher.

Messrs. PALMER & SHUTT, for appellee.

See Townsend on Slander, Secs. 307, 308, 335, 336; Sander-
son v. Caldwell, 45 N. Y. 398.

CONGER, J. This was an action on the case for slander. The declaration was as follows: "Also for that whereas, before and at the time of committing the grievance herein-after mentioned, the plaintiff held, used and exercised the office of president of the Illinois Miners' Protective Association, by appointment of said association, and received and enjoyed therefrom a salary of, to wit, \$100 per month, as such president, which said association was then and there and for a long period theretofore had been a voluntary association of all persons working in and around the coal mines in the State of Illinois. And one of the objects of said association then and there was to promote the best interests of said persons in their said occupation, and to promote harmony as to work and wages among said persons in their said occupation. And it was then and there the duty of the plaintiff, as president of said association, to so demean himself as to advance the said object of said association, and to promote the best interests of said persons in said occupation, and to promote harmony as to work and wages among said persons in said occupation.

And the plaintiff avers that he hath always during the time of his being such president, faithfully, properly and honestly discharged his said duty as president of said association, and dealt honestly, equally and fairly as such president, with all persons working in and around the coal mines in said State, and never was guilty of the offenses and misconduct hereinafter stated to have been charged upon and imputed to him by said defendant, nor until the time of the committing of the grievances by the defendant, as hereinafter mentioned, was ever suspected of any such offenses or misconduct, by reason whereof the plaintiff had deservedly acquired the honor, esteem and good will of his neighbors and of said association, and of the said persons working in and around the coal mines in the State of Illinois.

Nevertheless the defendant, well knowing the premises, but contriving and wickedly and maliciously intending to injure the plaintiff in his good name and reputation, and to bring him into disgrace, scandal and distrust as president of said association among his neighbors and other good citizens and the said association, and among the persons working in and around the coal mines in said State, on, to wit, the 1st day of January, A. D. 1888, at the county aforesaid, in a certain discourse which the said defendant then and there had, of and concerning the plaintiff, and of and concerning the plaintiff in the execution of his said office of president of said association, in the presence and hearing of divers persons falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in the exercise of his said office, the false, scandalous and malicious words following, that is to say: "Let me (meaning said defendant) tell you, boys, something that may be you don't know. Let me (meaning defendant) tell you that old Dan McLaughlin (meaning plaintiff) is carried on the pay rolls of the C. W. & V. Coal Company, at the rate of \$75 a month, for keeping up an agitation among the miners (meaning persons working in and around the coal mines in Illinois) of Central and Southern Illinois, so that the mine owners of Northern Illinois can get all the trade, and I (meaning defendant) know it." Meaning and intending thereby to charge the plaintiff with wilfully and corruptly, and for his own gain, neglecting and failing to so demean himself as to advance the said object of said association, and wilfully and corruptly, and for his own gain, neglecting and failing to promote the best interests of the persons working in and around coal mines in said State, and with wilfully and corruptly, and for his own gain, refusing and neglecting to promote harmony as to work and wages in said occupation, among persons engaged in working in and around coal mines in said State.

And meaning and intending thereby to charge the plaintiff with wilfully, corruptly and for his own gain, permitting himself, while so president of said association, to be employed by the C. W. & V. Coal Company, for the purpose of interfering with and retarding said object of said association, and

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for the purpose of injuring the best interests of the persons working in and around the coal mines in Illinois, and for the purpose of producing absence of harmony as to work and wages in their said occupation, among said persons, contrary to his duty as president of said association. And meaning and intending thereby to charge that the plaintiff, while so being president of said association, accepted employment with the C. W. & V. Coal Company to keep up an agitation among the persons working in and around the coal mines in Central and Southern Illinois, to the injury of their best interests and to the destruction of harmony as to work and wages, between them and the persons working in and around coal mines in Northern Illinois, so as to diminish or prevent the mining of coal in the coal mines of Central and Southern Illinois, and so enable the mine owners of Northern Illinois to control the trade in coal.

He, the said defendant, then and there intending to be understood as so meaning, and he being then and there so understood by the persons by him so addressed, as aforesaid.

By means whereof the plaintiff hath been greatly injured in his good name, fame and credit, and has suffered great anxiety of mind, and been exposed to the loss of his said office of president of said association, and the emoluments thereof."

To this declaration a demurrer was interposed and sustained by the court, and judgment went against appellant for costs, and he brings the record to this court for review.

We think the demurrer was properly sustained.

The words charged in the declaration are not actionable, *per se*, and can only be made so by proper averments that they "touch him in some office, business or employment."

The declaration fails to set out with sufficient clearness and certainty either the society or the duties of appellant as its president, to enable a court to say that the action charged against appellant would necessarily be a violation of such duties. The substance of the words charged is, that appellee said of appellant, that he, appellant, "is carried on the pay rolls of the C. W. & V. Coal Company at the rate of \$75 a month, for keeping up an agitation among the miners of Cen-

tral and Southern Illinois, so that the mine owners of Northern Illinois can get all the trade."

It is nowhere averred, and we are at a loss to know how it can be assumed, that keeping up an agitation among the miners of one section of the State, may not be in harmony with appellant's ideas of promoting the object of the association, of which he is president. His duties are only spoken of in a general way, being, to so demean himself as to advance the object of the association, and to promote the best interests of said persons in said occupation, and to promote harmony as to work and wages among said persons in said occupation."

The declaration we think entirely failed to show such a case as would require the appellee to defend, and hence the demurrer was properly sustained.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

CHARLES McNARY

v.

THE PEOPLE.

Criminal Law—Information—Charge of Assault with Deadly Weapon against Two Defendants—Conviction of One—Instructions—Costs.

1. Where an information charged the plaintiff in error and his brother with an assault with a deadly weapon, "to wit, a club and knife," an instruction to the jury that the information charged the defendants with making an assault with a deadly weapon with intent, etc., and that if the jury believe, from the evidence, beyond a reasonable doubt, that the defendants, as charged, did make the assault with a deadly weapon with an intent, etc., and where no considerable provocation appeared, or the circumstances showed abandoned and malignant hearts, they should return a verdict of guilty, was not erroneous, although the evidence tended to show an assault by the plaintiff in error alone and with a club only.

2. A deadly weapon is a weapon likely to produce death or great bodily harm by the use made of it.

3. It is not error for the court to refuse certain instructions, although

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they contain a correct statement of the law on the topics covered by them where the jury are elsewhere properly instructed on the same points.

4. In the case presented, this court declines to interfere with the decision of the court below, refusing an apportionment of costs, it not appearing that any costs were made, not necessary for the prosecution of the case as against the plaintiff in error.

[Opinion filed November 23, 1889.]

IN ERROR to the County Court of Clark County; the Hon. H. GASSAWAY, Judge, presiding.

Mr. S. S. WHITEHEAD, for the plaintiff in error.

Mr. T. L. ORNDORFF, State's Attorney, for the defendants in error.

PLEASANTS, P. J. This was an information against plaintiff in error and his brother, John, charging an assault on Samuel Graham "with a certain deadly weapon, to wit, a club and knife," with intent to do a bodily injury. There were two counts, alike in all respects, except that one alleged there was no considerable provocation and the other that the circumstances showed an abandoned and malignant heart. John was acquitted but Charles was found guilty and judgment rendered accordingly.

Exceptions were taken to almost everything allowed or refused by the court, and are here urged with a freedom of reflection upon the judge, which we think unwarranted and feel bound to rebuke. While we mean to give all due consideration and weight to argument it should be understood that the endeavor to do so is more likely to be frustrated than aided by the interjection of such matter as appears on page 10 of the brief for plaintiff in error.

The first instruction given for the people stated that the information charged the defendants with making an assault upon Graham with a deadly weapon (not designated) with intent, etc.; and that if the jury believed from the evidence, beyond a reasonable doubt, that the defendants, as charged,

did make an assault upon the person of said Graham with a deadly weapon, instrument or other thing, with an intent, etc., and where no considerable provocation appeared, or the circumstances showed abandoned and malignant hearts, they should return a verdict of guilty.

There was an abundance of evidence tending to prove an assault by Charles with a club only, and that, although John, from some distance seeing two men holding him, rushed to the scene with a knife, he did not arrive until that assault was over and Graham had withdrawn beyond his immediate reach. Upon this state of the proof it is claimed that the instruction so given was erroneous in "not being confined to the only one of two alleged deadly weapons charged, which was in any way sustained by the proof as against Charles, either by his own act or that of his co-defendant." In this connection it is said that an instruction not applicable to the facts proved should be refused, and that the hypothesis assumed should be so broad in its application as to exclude all others, citing *Hamilton v. Hunt*, 14 Ill. 472.

This objection, if we understand it, rests upon a misapprehension. The instruction assumes no hypothesis, nor does it imply anything as to the effect, or weight, or even the existence of any evidence in the case. It is clear enough that the offense intended by the information was a joint assault, which, in its nature, is an assault by each, at the same time and with a common intent, by one with a club and by the other with a knife, although the language used is "a certain deadly weapon, instrument or other thing, to wit, a club and knife;" and Charles, being the defendant first named, and club, the weapon first specified, the natural construction would be that he was charged with using that weapon and John with using the other. That all this was so understood by the defendants and their counsel is manifest from the quotation above made from the argument here and from the fact that no objection, on account of variance or otherwise, was made to the evidence given of an assault by Charles alone and with a club only. Under the information, as framed, it would have been proper to show an assault by each at the same time, with the weapons

respectively charged, or by either, with the weapon charged to him, aided and abetted by his co-defendant, in either of which cases the proper verdict would be "guilty," as to both; or by either, with the particular weapon charged to him, without any evidence against his co-defendant, in which case the proper verdict would be "guilty" as to him, and "not guilty" as to his co-defendant. If, as to one, there was no evidence, the court might properly, of its own motion or on that of such defendant, upon the close of the people's case in chief, direct a separate verdict of acquittal as to him and discharge him. But the court would not be bound to do so of its own motion. It might submit the whole case, and as to both defendants, properly presuming that the jury, under a general instruction requiring proof of guilt beyond a reasonable doubt in order to convict, and advising them that if the evidence warranted it they might convict one and acquit the other, would return the proper verdict. In this case, if John had been acquitted by a separate verdict before it was finally submitted, the instruction doubtless would, as it should, have related to Charles and the charge against him alone. But there was no such separate verdict. John did not ask it, but saw fit to submit his case together with that of Charles. Nor did Charles object to it. Therefore the instruction related to the whole case and both the defendants, as submitted, with whatever of fullness or lack of evidence there was about it, and it was just such as is commonly given for the first of the series for the prosecution in criminal cases. Its usefulness may well be doubted, but its harmlessness hardly. For it amounts to no more than a statement to the jury that the character of their verdict should depend upon their belief, from the evidence, as to the material facts alleged in the information; that if it satisfies them beyond a reasonable doubt that these are true as alleged—in other words, that the defendants are guilty beyond a reasonable doubt—they should return a verdict of guilty; and the implication, which is about as clear and strong as the expression, is, that unless it so satisfies them, they should return a verdict of not guilty. But it presents no hypothesis at all in the proper sense of the term;

that is, no particular fact or condition upon proof of which they should or might find in any particular way upon the general question of guilt or any allegation in issue. By another, which should be considered in connection with this, they were advised that "they could find one or both of the defendants guilty, as they might determine from the evidence." We see no reason to apprehend that they were misled or influenced in any way by any supposed assumption or implication in this instruction or misapplied any of the evidence. Nor does their verdict against Charles of "guilty, as charged in the information," import a finding that he used a knife and a club. Their acquittal of John, in view of the evidence preserved, shows the contrary.

A deadly weapon was defined by the court as "one likely to produce bodily injury from the use made of it." Doubtless a more correct definition would have been, a weapon likely to produce death or great bodily harm by the use made of it, but we do not see how this error could have prejudiced the case of the defendant. The term "club" imports a deadly weapon, though in a given case it may not be for several reasons. And so, also, of a "knife." The information alleged it to have been such. Its form, size and character were described to the jury by comparison at least. The one claimed to have been used was produced. One witness positively identified it, and another testified to its similarity, if not to its identity, though this was denied by the defendant. The manner and effect of its use were also shown. According to all the testimony relating to it, except that of the defendant, whose account of the whole transaction and its several parts must have raised a smile in the jury box—it was clearly a deadly weapon, and an accurate definition should not have changed the finding.

The fourth instruction was in the usual and familiar form with reference to what is and what is not a reasonable doubt; but because it concluded with the statement that if the jury were satisfied from the evidence, beyond a reasonable doubt, of the guilt of the defendants, "or either of them," they should return a verdict of guilty, it is claimed that "in its

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fair intentment it ignored the separate rights of each," and required the conviction of both if either was found to be guilty. It could hardly be necessary to notice this palpably unreasonable construction, even if the court had not expressly instructed, as it did, that their verdict might be against one and not against both, according to their belief from the evidence.

By the fifth the jury were told that in determining the weight to be given to the testimony of the different witnesses, they "were authorized to consider (among other things stated) their relationship to the parties," if proved; and it is contended that the parties were the people and the defendants, and therefore that the instruction did not apply to George Graham, a brother of the prosecuting witness, who was called on behalf of the people, while it tended to weaken the testimony of some of the witnesses for the defense. There was no evidence showing a special relationship of any witness to the people of the State of Illinois, and we think it sufficiently obvious that by "the parties" the instruction was intended and understood to mean the parties to the alleged assault and not the parties to the record.

Complaint is also made of the refusal of some and the modification of other instructions asked by the defendants. All that we find in the abstract, however, relating to any so asked, is the following: "Rest of instructions for defendants offered, refused, given and modified, all on pages of record from 64 to 79 inclusive, as well as motions and errors preserved on pages 79 to 80."

We might, therefore, under the rule, decline to notice alleged errors in the court's action upon them. Some of those refused are set forth in the argument, but none of those given, whether modified or not. Upon an examination of the record itself we find no substantial support for these exceptions. It may be conceded that those refused, which are copied in the argument, presented in unobjectionable form the law of self-defense and the effect of danger apparently, though not really imminent or threatened, but the substance of all they contained was clearly and fully set forth in others that were given.

Another stated it to be "the duty of the jury to consider the reasonableness or unreasonableness of the contention of the prosecution in this case, and to consider whether it was probable, under ordinary motives of human conduct, that Charles McNary alone would go into what is shown by some of the evidence to have been demonstrated and regarded as Sam Graham and his body-guard, and there voluntarily commenced (commence) a difficulty by assaulting Graham among his friends, or whether, on the contrary, as he contends, he regarded himself in the company of men hostile to him, and only acted "in rightful self-defense against danger, which to him reasonably appeared to be threatened and imminent." Counsel admits "there may be one objectionable feature in it," but without indicating which one it is, unless by assigning its length as the reason for not reproducing it in the argument, still insists "it was fair toward all parties," and therefore we suppose that it ought to have been given. We think it vicious throughout. It presents as matter of law what is only matter of argument. It assumes that defendant was influenced by ordinary motives only; infers therefrom an improbability of the act charged, and then attributes to such supposed antecedent improbability the legal force of evidence or ground of presumption, to continue in operation after evidence produced, of whatever amount or weight, to rebut and overcome it. In every criminal case the law presumes the defendant's innocence, but only until the contrary is proved beyond a reasonable doubt; and if there is any evidence tending to prove it, an instruction to consider the presumption, without the qualification, will be improper. Here the question for the jury to consider was not whether he probably would or would not go, etc., but whether he actually did go, etc., and its determination properly depended, not on the antecedent probability or improbability of the fact, but upon the evidence produced which this instruction would have ignored. While it is generally if not always the case that crimes, which are *mala in se*, are against the weight of right reason—they are scarcely ever committed without reason, and it is by no means unreasonable in any sense to expect their

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commission and to believe the fact in any given case upon the testimony of credible witnesses. In this case the defendant had the benefit of proper instruction to the jury as to the presumption of innocence and its legal weight and effect. This covered all that was sensible or proper in the one proposed, and on that point he was entitled to no more.

The court struck out from another instruction asked the concluding statement—that “if any witness is successfully impeached by proof that he made statements about this case, or any part of it, out of court, inconsistent with the truth of his testimony here, the jury may entirely disregard his testimony delivered before them, or give it only such weight as they may think it entitled to.” The latter of these alternatives might have been retained, but it was so clearly implied in the preceding part which was given, stating the different ways and means by which the credibility of a witness may be impeached—among which the last mentioned was, by making the proof so specified—that the defendant could not have been prejudiced by its erasure. As expressed in the quotation above it was certainly in bad company. There is a difference between disbelieving a part or even all of the testimony of a witness after fairly considering, weighing and comparing it and “entirely disregarding” it. The one may be justified by his lack of intelligence, attention or memory, but the other only by his wilful falsehood in respect to a material fact.

Some questions put to one of the people’s witnesses, to show an unfriendly feeling against the defendant, were excluded, which might have been allowed; but we think they were of little force and that their exclusion could not have affected the result. His feeling was probably as well shown otherwise as it could have been by them, and his testimony as to the assault was fully corroborated in all important particulars by that of the prosecutor, and of two other and unbiased witnesses—being all who were present besides the defendant.

It is said the judgment wrongly imposed upon plaintiff in error all the costs of the proceeding against both defendants, instead of those only which were made in prosecuting him,

and that the court erred in denying his motion to apportion them. The record, however, does not enable us to see that any was made which was not properly made for the prosecution as against him. It will not be so presumed.

Perceiving no material error the judgment will be affirmed.

Judgment affirmed.

BUKER E. MARTIN ET AL.

V.

ANDREW J. FIELD.

Negotiable Instruments—Note—Real Property—Sale—Vendor's Lien—Evidence.

Upon a bill to enforce a vendor's lien for a purchase money note, the decree of the Circuit Court is affirmed, the sole question being as to alleged payment thereof.

[Opinion filed November 23, 1889.]

IN ERROR to the Circuit Court of Morgan County; the Hon. C. EPLER, Judge, presiding.

Messrs. MORRISON & WHITLOCK, for plaintiffs in error.

Messrs. O. P. THOMPSON, E. P. KIRBY and O. A. BARNES, for defendant in error.

CONGER, J. This was a bill in chancery, brought by appellee against appellants to enforce a vendor's lien. The bill alleges that in 1879 Field sold a lot of ground in Jacksonville, Illinois, to Martin, for \$1,000, receiving therefor \$200 in cash and Martin's note for the remaining \$800, due in five years, bearing eight per cent interest; that no part of the note had been paid, and praying for the enforcement of a vendor's lien. The answer admits the purchase and the

I., D. & S. R. R. Co. v. Davis & Finney.

price, as alleged in the bill, the payment of the cash and the giving of the note, but sets up, as a defense to the proceeding, that in 1880, by agreement of the parties, Martin conveyed the land to the wife of Field, for her life, and that of her husband (appellee), with remainder to his own wife, Mrs. Martin, by which the note was paid, the lien discharged and the note surrendered to appellant.

A general replication was filed, the cause referred to a master, and upon the evidence taken the court below found that the note had not been paid, but that there was due upon it the sum of \$1,370.95, and a decree was entered accordingly. The whole controversy is one of fact and it would serve no good purpose to review the evidence upon this question.

We have carefully read it and are fully satisfied that it sustains the finding of the Circuit Court.

The decree will be affirmed.

Decree affirmed.

INDIANAPOLIS, DECATUR & SPRINGFIELD RAILROAD
COMPANY

v.

DAVIS & FINNEY.

Railroads—Pleading—Demurrer—Rebate—Agreement by Freight Agent—Discrimination.

In an action on a promise by the general freight agent of a railroad company to give a rebate on certain freight charges, it is held that the plea of said company, alleging that the promise was without authority and void under the statute against discrimination, should have been held good on demurrer.

[Opinion filed November 23, 1889.]

IN ERROR to the Circuit Court of Douglas County; the Hon. C. B. SMITH, Judge, presiding.

Mr. JAMES A. EADS, for plaintiff in error.

No brief was filed for defendants in error.

Per Curiam. This action was brought against the railroad company, on a promise by its general freight agent to pay back to plaintiffs, by way of rebate, a certain portion of the regular freight charges on shipments to be made by them. The company attempted to defend, under pleas of the general issue, statute of limitations and a special plea setting out facts showing that the promise relied on, which it averred was made without authority from the defendant—was an undertaking to discriminate in favor of the plaintiffs, in violation of the statute, and therefore void. The court, having sustained a demurrer to this plea and excluded evidence offered to prove it, under the general issue, rendered judgment on its finding for plaintiffs for \$1,540.49, to all of which exception was duly taken and preserved.

It will thus be seen that it was a companion case to that of Ervin against the same company, reported in 118 Ill. 250, and for the reasons therein given this judgment also must be reversed and the cause remanded.

Reversed and remanded.

THOMAS SNELL ET AL.

V.

JAMES DE LAND.

Account—Master's Report.

Decree of Circuit Court entered in accordance with a master's report upon a complicated account is affirmed.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of DeWitt County; the Hon. C. EPLER, Judge, presiding.

O. & M. Ry. Co. v. The People.

Mr. THOMAS F. TIPTON, for appellants.

Messrs. MOORE & WARNER, for appellee.

Per Curiam. This was a bill in chancery filed by appellants against appellee for partition and for an account. The parties owned as tenants in common two farms, and the management of one being in appellants and of the other in appellee, a long and somewhat complicated account between the parties had to be adjusted. The cause was referred to a special master, who took the evidence and reported his conclusions to the court; exceptions were filed thereto which, being overruled by the court, a decree was entered in accordance with the finding of the master, that appellant pay to appellee the sum of \$1,320. We have carefully examined the evidence, and the exceptions and reasons urged against the decree of the court, and perceive no error, but think that substantial justice has been reached.

It would serve no good purpose to enter into a detailed statement of the various items entering into the final decree, but we are satisfied with the conclusion reached by the court, and therefore the decree of the Circuit Court will be affirmed.

Decree affirmed.

82	69
106	623

THE OHIO & MISSISSIPPI RAILWAY COMPANY

V.

THE PEOPLE EX REL., ETC

Railroads—Mandamus—Petition for, to Compel Company to Build Sewer—Construction of Ordinance Granting Right of Way—Pleading.

Upon a petition for *mandamus* to compel a railroad company to build a sewer in accordance with the requirements of a city ordinance, this court holds that the allegations that the sewer was necessary to the proper drainage of the street in which it was to be built, and for the proper grading thereof, were essential under the terms of the original ordinances granting the right of way, by virtue of which it was sought to compel defendant to

build the sewer, and therefore, that a denial of these allegations by answer, raised a question of fact necessary to be determined, and that the demurrer to the answer should have been overruled.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Sangamon County; the Hon. J. A. CREIGHTON, Judge, presiding.

Messrs. LAWRENCE MAXWELL, JR., J. H. MATHENY, JR., POLLARD & WEENER and RAMSEY, MAXWELL & RAMSEY, for appellant.

Messrs. PATTON & HAMILTON and TIMOTHY McGRATH, for appellee.

WALL, J. This was a proceeding by *mandamus* to compel the appellant to make certain improvements in Salome avenue in the city of Springfield. The appellant demurred to the petition, but the demurrer was overruled and then an answer was filed to which the relator demurred. The latter demurrer was sustained, and the appellant not answering further, a judgment was entered according to the prayer of the petition, from which judgment an appeal is prosecuted to this court by the railroad company.

On the 5th of March, 1869, the city passed an ordinance granting to the Pana, Springfield & Northwestern Railroad Company the right of way upon any street or avenue of the city upon the following condition:

"That said company shall so grade, level and bridge said street or avenue, on both sides of their track, as to be at all times conveniently passable for teams or carriages, with convenient access to and from the same, as well as on both sides of each street and alley crossing said track.

"The said company shall make, construct and at all times keep in repair, sufficient and suitable crossings for foot passengers, culverts, ditches and whatever else shall be needful for the complete and convenient passage, use and drainage of said street or avenue." Various other provisions of the ordinance need not be noticed.

On the 7th of July, 1870, an ordinance was passed granting the right of way to the Springfield & Illinois Southeastern Railroad Company, with which the Pana, Springfield & Northwestern Railroad Company had been consolidated, on Madison street east from Third street, and upon Salome avenue, subject to all the requirements contained and prescribed in the said ordinance of March 5, 1869.

The appellant company became the owner of the railway of the last named consolidated company, with all the rights and privileges of the said company, including the track and right of way on Salome avenue, about February 1, 1875, and has ever since operated the said property. On the 8th of August, 1887, the city passed an ordinance requiring the building of a sewer along the west line of said avenue according to certain specifications set out in the ordinance. The petition averred that the building of the sewer was necessary for the drainage of said avenue, and that without the building of said sewer said avenue can not be conveniently passed over and used, and that said avenue then was wholly impassable on one side of the railroad track on account of not being drained, leveled and graded. The last named ordinance further provided:

“Sec. 3. After the laying of said sewer, as above provided, the street shall be graded and filled so as to allow teams and carriages to conveniently pass along the avenue on either side of the track.

“Sec. 4. All said work of laying said sewer and grading said street shall be done by the Ohio & Mississippi Railway Company, and all materials therefor shall be furnished by said railway company.”

“The said Ohio & Mississippi Railway Company shall begin the work within thirty days after the passage of this ordinance, and shall prosecute the work to completion as speedily as consistent with good workmanship.”

The petition averred that the railroad company had refused, after notice and demand, to make said improvement, and it prayed for a peremptory *mandamus* to compel compliance with said ordinance. The answer averred—

"1. That at and before the time said railroad track was laid in said Salome avenue, a natural watercourse or ravine, commonly known as the Town Branch, being about twenty-five feet in width, and descending by precipitous embankments to a depth of from ten to fifteen feet, ran along the extreme west side of said avenue, and that the only place for travel was by a road in the middle of the eastern side of said avenue. There was no access from the east side of said avenue, across said ravine, to the property abutting on the west side of said avenue. All of said property was and still is unimproved and is occupied only for pasturage. And there was and is no way of passing from the east to the west side of said ravine, except over the streets which cross and intersect said Salome avenue, at which point said ravine passes under said intersecting streets through culverts. Said large main sewer, commonly known as the Town Branch, mentioned in the petition, emptied and discharged into said ravine, at the intersection of Mason street with Salome avenue, and the sewage coming from said main sewer was carried thence along and in said ravine to a point beyond the city limits. Said railroad track is laid along the east edge of said ravine. It occupies about nine feet in width, including ties and all other structures, and does not touch or come at any point within twenty feet or more of the customary and only place of travel on said avenue, which is, as alleged in the petition, along the middle of the eastern side of said avenue. Said railroad track is on grade with said roadway in said avenue, and in no way interferes with, or affects the same, or the use thereof for travel."

"Said avenue is, and ever since the defendant has occupied it has been, perfectly and completely drained. The sewer referred to in said ordinance of August, 1887, can not be used, and is not intended to be used for the drainage of said Salome avenue, but is simply an extension of said main sewer, which, at the time of the laying of said track, and now, empties into said ravine at Mason street and Salome avenue. Said proposed sewer is without openings or provisions for the local drainage of Salome avenue. The work required by said ordinance, of this defendant, would cost about \$20,000."

"It is in no wise made necessary by the defendant's track or use of said avenue, but is simply an attempt on the part of the petitioner to require this defendant to transform said ravine into a walled sewer, and thereupon to build a street over the same. And the defendant submits that such is not the true construction and intent of said original ordinances, and that the defendant is under no obligation, by virtue of said original ordinances or otherwise, to comply with said ordinance of August, 1887. The defendant denies that said avenue is impassable, or that the use of the same for travel is in any way affected, either by the defendant's track or by the defendant's use thereof. There are no buildings abutting on either side of said avenue, and the condition of said avenue, with respect to drainage and roadway, for travel, is the same, or better now than it was before said track was laid."

"2. For further answer the defendant says that if such, as claimed by petitioner, be the true meaning and effect of said ordinance, then the obligation in that behalf imposed by said ordinance, was completely broken by said Springfield and Illinois Southeastern Railway Company long before the defendant acquired any interest in or title to said railway, which title was acquired by mesne conveyances through a sale of said railway at foreclosure, in 1875; whereas, said Springfield and Illinois Southeastern Railway Company had laid said track in said avenue in 1870, and used and occupied the same continuously thenceforth for more than five years before the defendant acquired said railway. And said obligation did not pass to and devolve upon this defendant."

"3. For further defense the defendant says that if such, as claimed by the petitioner, be the true construction and effect of said original ordinances, then the obligation to build said sewer, as insisted upon in said ordinance of August, 1887, accrued more than seventeen years before the commencement of this suit, and is barred by *laches* and by the statute of limitations. Wherefore this defendant prays to be dismissed hence with its costs."

Assuming, without deciding, that on the case presented by the petition *mandamus* is the proper remedy, and that the

requirements of the original ordinances, granting the right of way, are binding upon the appellant as the successor of the companies named in those ordinances, and that the duty thereby imposed is a continuing one to be enforced whenever it may become necessary, the only question we propose now to consider is, whether the answer shows such a state of facts as to bar the relief sought by the petition. The averment of the petition important to be observed in this connection is, that such sewer is necessary, first, for the proper drainage of the street, and second, for the proper grading thereof, in order to render the same passable for teams and carriages. This averment was essential, since by the terms of the original ordinance it is apparent that the company, using the street for railroad purposes, was required to do no more than was, or should become "needful for the complete and convenient passage, use and drainage of said street and avenue." Such, indeed, is the express language of the ordinance; but the condition here expressed would be a legal inference, had these words been omitted. In view of the provisions of the original ordinance, as well as of the second ordinance granting the right of way to the consolidated company, it would be unreasonable to require the making of an improvement not necessary for the drainage or use of the street.

Therefore the averment of the petition in this respect was proper and requisite, and if so, the answer properly met the averment by setting up such a state of facts as would demonstrate that the demanded improvement was not necessary for either the drainage of the street or for convenient passage over the same. It can not be that under pretense of draining this street the railway company may be compelled to make a sewer wholly unnecessary for the drainage of the particular street, and useful only to drain and carry away the entire sewage of the city at large. And if the facts set forth in the answer are true, there is no occasion to convert so much of the street as is occupied by the Town Branch into a roadway, in order to afford a convenient passage for teams and carriages along said Salome avenue.

Whether the demanded improvement is needful for the

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drainage of the avenue or for convenient passage thereon is a question of fact, but when the answer denies such needfulness it interposes a complete defense to the petition. It follows that it was error to sustain the demurrer to the answer and the judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

THE CITY OF HOOPESTON

v.

CATHERINE A. EADS.

Municipal Corporations—Personal Injuries—Defective Sidewalk—Contributory Negligence—Burden of Proof—Duty of City—Notice—"Considerable Time."

1. In an action against a city for an injury received from a defective sidewalk, the burden is on the plaintiff to prove due care.
2. The duty of a city to keep its sidewalks in repair is not an absolute one. Reasonable diligence in that behalf is all that is required.
3. The phrase, "a considerable time," is too indefinite for use in instructions to a jury.
4. Where the proof on the part of the plaintiff is inconclusive as against a strong defense made by the city, in an action for alleged negligence, it is specially important that the instructions given should be accurate and not conflicting.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Vermillion County; the Hon. E. P. VAIL, Judge, presiding.

Messrs. H. M. STEELY and J. B. MANN, for appellant.

Where walk has recently been placed in good repair and the city has had no notice of the defect, and it has not existed for such a length of time that the city, if using due diligence, might have known of it, the city is not liable. The City of Chicago v. McCarthy, 75 Ill. 802; The City of Chicago v. Murphy, 84 Ill. 224; The City of Chicago v. Watson, 8 Ill. App. 344.

So if defendant convicts plaintiff of negligence at the time of the accident. *C. & E. I. R. R. Co. v. O'Conner*, 13 Ill. App. 62.

As to instruction shifting burden of proof, see *Stearns v. Reidy*, 18 Ill. App. 582.

Error in one instruction not cured by others that are proper. *P. & P. U. Ry. Co. v. O'Brien*, 18 Ill. App. 28; *C. & B. & Q. R. R. Co. v. Harwood*, 80 Ill. 88; *C. & N. W. Ry. Co. v. Dimick*, 96 Ill. 42.

Messrs. WILLIAM A. YOUNG and WILLITS & JOHNSON, for appellee.

We think the following authorities sustain this case and many of these are in the circumstances like case at bar. *Schmidt v. C. & N. W. Ry. Co.*, 83 Ill. 405; *Sterling v. Thomas*, 60 Ill. 264; *Champaign v. Patterson*, 50 Ill. 61; *Chicago v. Johnson*, 53 Ill. 91; *Springfield v. LeClare*, 49 Ill. 476; *Chicago v. Crooker*, 2 Ill. App. 279.

The criticism and error assigned on the instructions is unwarranted. Appellants misconceive the scope of the first instruction. It simply states a plain proposition of law, and that if they found the fact, then appellant was liable, unless they found the other party was not exercising reasonable and ordinary care. It is not required that all the law on the subject be stated in each instruction, nor is it necessary to note all the exceptions to the rule. If the exceptions are covered in other instructions such an instruction will not be considered vicious. *Stratton v. C. C. Horse Ry. Co.*, 95 Ill. 25; *Peeples v. McKee*, 92 Ill. 397.

The fifth instruction, it is claimed, in the use of the words, "a considerable time" is vicious. The words may not be the most appropriate to use, but we find the expression used by the Supreme Court in its opinions. Webster, in his definition of "considerable," says it means "noteworthy, of notice; requiring to be observed or attended to." That being the case, the jury certainly could not have been misled. *Chicago v. Dalle*, 115 Ill. 386; *Springfield v. Doyle*, 76 Ill. 202; *Ill. Cent. R. R. Co. v. Shultz*, 64 Ill. 172.

We submit that when the whole series of instructions are construed together, as they should be, the whole law has been covered, and that the jury could not have been misled. Even though some of the instructions were faulty they were cured by the series. *Kendall v. Brown*, 86 Ill. 387; *T., W. & W. Ry. Co. v. Ingraham*, 77 Ill. 309; *Myer v. Mead*, 83 Ill. 19; *Aurora v. Gillett*, 56 Ill. 132; *Durham v. Goodwin*, 54 Ill. 469.

WALL, J. The appellee recovered a judgment against the appellant for \$875 on account of injuries sustained by reason of a defective sidewalk. There is no doubt that the plaintiff was injured and that the damages awarded are not unreasonably high, but upon the proof it is quite a close question whether she was exercising ordinary care and whether the defendant had notice, actual or constructive, of the defect in the walk.

The accident occurred about 5 o'clock in the afternoon of September 18, 1887. While not a bright, sunshiny day it was not cloudy, and the hole in the walk, six inches wide and a foot or more in length, was plainly to be seen by any one who was observing. The plaintiff's daughter, who was with her, saw the hole and stepped around or over it, but the plaintiff, failing to notice it, stepped into it and received the injury complained of. It was, of course, the plaintiff's duty to use ordinary care to perceive the danger and avoid it. It was necessary to so allege and prove as a condition of recovery. This was one of the affirmative features of her case and the burden was upon her to make it out by the weight or preponderance of the evidence. In this connection complaint is made of the following instruction given for plaintiff:

1. "The court instructs the jury that it is the duty of the city to make and keep its streets and sidewalks within the city in a reasonably safe condition for pedestrians to pass along and over the same in the prosecution of their reasonable and lawful avocations, either for business or pleasure; and in this case, if the jury find that the defendant has failed and neglected to do so, then it is liable, unless they further find the plaintiff was not exercising reasonable and ordinary care in passing over said street or right of way."

It will be noticed that the instruction seems to fix liability upon the facts supposed, unless the jury find the plaintiff was not exercising reasonable and ordinary care, etc., as though this was a matter of defense, and apparently permitting the jury to shift the *onus* in this respect from plaintiff to defendant. The instruction is faulty for this reason, and for the further reason that it states it to be the absolute duty of the city to keep its streets in reasonably safe condition; whereas it is only required to use reasonable diligence to that end, and whenever a street becomes unsafe the city is not liable unless it has notice or unless such lapse of time has intervened, that in the exercise of reasonable care and diligence it would have known of the defect and might have made the necessary repairs. Dillon on Municipal Corporations, 2d Ed., Sec. 790; City of Chicago v. McCarty, 75 Ill. 602; City of Centralia v. Krouse, 64 Ill. 19.

Complaint is made also of the following instruction given at the instance of the plaintiff:

5. The court instructs the jury that it is the duty of the city to keep its streets and sidewalks in a reasonably safe condition for persons to travel over, and when a street and sidewalk on a public street gets out of repair, so that it is unsafe to travel upon, and so remains a considerable time, notice will be presumed and proof of actual notice will not be required. (Given.)

This is faulty for the reason assigned with reference to the first instruction, as to the non-absolute duty of the city and because it does not correctly state the rule with regard to notice. "A considerable time" is a very indefinite expression, and while it may be found in some judicial writings, yet it would hardly be admissible where the court is laying down a rule of law to a jury. As just observed the city is not liable where there is no actual notice, until there has been a sufficient length of time, that by the use of ordinary care the defect would have been ascertained. In the present case the evidence very strongly tends to prove that the walk in question had been relaid but a very short time before the accident; that it was the custom of the street commissioner to pass

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over and inspect all the walks in the city on Friday and Saturday of each week; that he probably did so in this case (the accident occurring on Sunday), and that the break in the walk was caused by a horse stepping upon or running over it. The city thus made out a strong defense, against which the proof, on the part of the plaintiff, was quite inconclusive, if not positively weak. In such condition of the proof the well-settled rule of the Supreme Court is that the instructions should be accurate, and that there should be no conflict between those given at the instance of the respective parties. We are inclined to consider this a case where the rule should be applied, and the judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

WILLIAM H. MORGAN ET AL.

V.

THE BLOOMINGTON MUTUAL LIFE BENEFIT ASSOCIATION.

32	79
53	537
32	79
74	489
32	79
77	445

Life Insurance—Membership—Certificate in Benefit Association—Action on—Statements in Application—Representations or Warranties—Question of Law—Evidence.

1. Where a contract is reduced to writing there is no fact affecting its terms for the jury to find. The law then determines the intent of the parties from the written expression, and so fixes its meaning, which it is the province of the court to declare.

2. In an action on a certificate of membership in a mutual benefit association this court holds, that the answers in the application were, as matter of law, unconditional warranties, and that evidence tending to show their simple untruth, without regard to the knowledge or good faith of the insured or beneficiaries, was admissible.

[Opinion filed November 23, 1889.]

IN ERROR to the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

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Messrs. TIPTON & BEAVER, for plaintiffs in error.

The burden of proving answers made by the assured in his application to be untrue, is upon the defendant. *N. W. M. L. Co. v. Hazlet*, 4 N. E. Rep. 582; *Ins. Co. v. Gridley*, 100 U. S. 614; *P. & A. Life Ins. Co. v. Ewing*, 92 U. S. 377; *Swik v. Home Ins. Co.*, 2 Dill. 160; *Hancock Ins. Co. v. Daly*, 65 Ind. 6; *National Association v. Grauman*, 7 N. E. Rep. 233.

No statements are to be considered as warranties, except as it is expressly and particularly provided in the contract that they shall be such. *Alabama Gold L. I. Co. v. Johnson*, 2 So. Rep. 125, and cases cited. *Ill. M. Ben. S. v. Winthorp*, 85 Ill. 537.

The application is only to be a part of the contract, for so much as it is stipulated and agreed in the application that it shall be; and is referred to in the certificate or policy as the basis of the contract. *Am. L. I. Co. v. Day*, 39 N. J. Law, 89; *Price v. Phoenix Ins. Co.*, 17 Minn. 504; *Wilson v. Conway Ins. Co.*, 4 R. I. 143; *Daniel v. Hudson River Co.*, 12 Cush. 424; *Richmond v. Hart F. I. Co.*, 47 Wis. 89.

The certificate and the whole contract are to be strictly construed against the company. *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Schmidt v. Ins. Co.*, 41 Ill. 295; *Continental L. Ins. Co. Rogers*, 119 Ill. 475.

Whether statements made by the assured in his application are warranties, is a question of fact or intention to be found by the jury. *American L. Ins. Co. v. Day*, 39 N. J. Law, 89; *May on Ins.*, Sec. 159, p. 185, and cases cited in note 1; *Schnider v. Farmer's Ins. & Loan Co.*, 13 Wend. 92.

That statements made by the assured were material to the risk are questions of fact to be decided by the jury. *Yates v. Mad. Co. Ins. Co.*, 2 Comstock, 44, and cases *supra*.

Mr. F. Y. HAMILTON, for defendant in error.

A warranty is an agreement in the nature of a condition precedent, and like that, must be strictly complied with. *May on Ins.*, Ch. VI, p. 179; *Daniels v. H. R. Fire Ins. Co.*, 12 Cush. 416; *Campbell v. N. E. Mut. Life Ins. Co.*, 98 Mass. 381; *H. Ins. Co. v. Gray*, 91 Ill. 159.

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The application was made a part of the contract of insurance and a warranty on the part of the assured. May on Ins., Ch. VI, Secs. 158-9, and cases cited; Continental L. Ins. Co. v. Rogers, 119 Ill. 474.

Facts alleged to be true in the declaration must be proven. The declaration avers that statements in application are true and that no facts relating to health had been suppressed. This put the burden of proving them to be true on the plaintiffs. This is fundamental and needs no authorities to support it.

PLEASANTS, P. J. Plaintiffs in error are the father, mother, and sister of Charles A. Morgan, and brought this action upon a certificate of membership, issued to him by the defendant in error, dated August 27, 1886, declaring his right to participate in its beneficiary fund to the amount of \$4,900, payable sixty days after his death, to said plaintiffs, respectively, in the parcels therein specified.

Charles died July 4, 1887. Two months before that event the manager of the association wrote to him returning the amount of his last assessment (\$3.75), and stating that for reasons given in a preceding letter it was obliged to declare his policy void and canceled, and had so marked it on its books; and the defense set up on the trial, under the general issue was, that material statements made by deceased in his application for insurance, and warranted to be true, were untrue. The jury returned, with divers special findings, a general verdict for the defendant, on which the court entered judgment after overruling a motion for a new trial.

Among the questions and answers in the application were the following: "Q. Has your general health been uniformly good for the past ten years? Ans. Yes. Q. Has any physician ever given any unfavorable opinion of the insurableness of your life? Ans. No. Q. Have you personally consulted a physician, been prescribed for or professionally treated within the past ten years? Ans. No."

And among the special interrogatories to the jury on the part of the plaintiffs and answers thereto were the following:

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"Q. Did Charles A. Morgan know, at the time of the making of the application for insurance, on August 26, 1886, that he had had any trouble with his lungs or that then his lungs were affected? Ans. Yes. Q. Did the assured, Charles A. Morgan, at the time he made his application for insurance answer all material questions truthfully? Ans. No. Q. Was the spitting of blood, as shown by the evidence, a disease, or simply a temporary ailment? Ans. Disease. Q. Was the affliction of Charles A. Morgan spoken of by Dr. Norris throat trouble or lung trouble? Ans. Lung trouble." To special interrogatories, submitted by the defendant, the jury answered that he had disease and hemorrhage of the lungs and spitting of blood in the spring of 1886; that his health had not been uniformly good during the period of ten years next before his application, and that he had been prescribed for and professionally treated within that period.

Dr. Norris, a graduate of Rush Medical College, Chicago, and in active practice for sixteen years, testified that in March, April and May, 1886, he examined, prescribed for and professionally treated the deceased, who was then suffering from disease and hemorrhage of the lungs, and had a cavity in one of them, and that on the occasion of his last visit—about May 14th, he told Wm. H. Morgan, father of deceased and one of the plaintiffs herein, that by reason of such disease Charles would probably not live long, and that he, the doctor, could not, under any circumstances, recommend him for insurance.

The only scientific or professional evidence tending to show he was not then so diseased was the testimony of Dr. Gardiner, also a regular graduate and of thirty years' practice, who examined him at the time of his application and certified the result. He had never before heard of the applicant, nor does it appear that he ever saw him again. He had but little independent recollection of the particulars of the examination. Referring to his certificate, however, he testified that his general appearance was that of a fairly healthy young man; that he didn't find anything the matter with his lungs, and that the chest expansion in respiration shown by the measurement, as certified, would be taken, as a rule, to indicate that they were sound.

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The certificate itself, if admissible, would be but a duplicate of his testimony and not an addition to it, and the other doctors, Hallett and Orner, having no personal knowledge of the case, testified only as experts that if Dr. Gardiner was right they would think it highly probable Dr. Norris was mistaken. Of course the converse must be equally true. Of the lay witnesses, some testified that during that spring and summer Charles looked well and did farm work, while others stated that at times he looked ill and weak and had to quit work. Dr. Norris was supported by uncontradicted proof of statements by the deceased and his father that he had hemorrhages which they regarded as being clearly from the lungs and very alarming.

Upon this evidence, which is substantially all that related to his actual condition in respect to health before and at the time of his application, in connection with his answers and statements in regard to it in his application, as above shown, it is manifest that each of the special findings mentioned was fairly supported, and that the jury might also as well have further found, if asked, that a physician had, after examination, given a very decided opinion unfavorable to the insurableness of his life; that if these findings were true his answers to each of the three questions stated were untrue; and that each of those answers contained a statement of fact which was material to the risk, notwithstanding the further finding that on August 26, 1886, when he made his application, he was in good health. Whatever was his apparent condition at that time, or the association may have believed it to be, or the fact really was, it was important to know what it had been or appeared to be so shortly before; nor can it be doubted that if it had known his apparent condition in the spring, or Dr. Norris' opinion of his insurableness, as then expressed to W. H. Morgan, it would have made further inquiry or peremptorily declined to entertain the application.

One of the alleged errors most confidently complained of was the admission of that opinion. Charles was not present when it was said to have been expressed, nor does it appear that he or his mother or sister were ever informed of

it, or that either of the plaintiffs had any agency in procuring the insurance or knew that they were to be the beneficiaries.

It is therefore claimed that this evidence had no tendency to show fraud on their part, and contended that on no other ground could it be competent, especially as against the mother and sister of the deceased. But it is certainly clear that if it was competent to show the simple untruth of the answer that no physician had ever given such an opinion, without regard to the knowledge or belief, or good or bad faith of the respondent, or the innocence of the plaintiffs in the premises, then the admission of this evidence was proper; and whether it was competent to show it would depend upon the question whether that answer was a warranty or only a representation. If a warranty, its untruth was a breach, and any competent evidence of a breach would be competent against anybody claiming under the contract, even though they were, as these plaintiffs were not, purchasers for value.

In the instructions given to the jury the answers to the three questions above quoted were held to be warranties and material to the risk. Appellants insist it was the province of the jury to find as to both these points, because they depended upon a matter of fact, to wit, the intention of the parties. Perhaps it would be more accurate to say, upon their intention as manifested, and we apprehend the rule to be that where this is done by oral declarations or acts *in pais* provable only by evidence in its nature subject to explanation and contradiction, it is for the jury to find it, and it determines the terms of the several stipulations and also their materiality when that is in issue. But where the contract is reduced to writing there is no fact affecting its terms or construction for the jury to find. The law then conclusively determines the intention from the written expression, and so fixes its meaning, which it is therefore the province of the court to declare.

Did the court truly declare its meaning in this case? The contract is evidenced by the certificate of membership set out *in haec verba* in the declaration, which includes whatever else is therein by reference expressly made a part of it; and the application for membership is so referred to. The certificate

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states that "in consideration of \$10 membership fee having been paid * * * and in consideration of the warranted representations, covenants and agreements made in his application, No. 7,674, which is hereby made a part hereof and the basis of this membership, * * * this certificate of membership is issued to Charles A. Morgan," etc. The application is therein further stated to be "on file in the office of said association and made a part of this certificate, as warranted statements on the faith of which this certificate is issued." Warranted representations or statements are not mere or simple representations, but are warranties.

There also appears in the body of the certificate a stipulation "that in case the statements made in the application are not in all respects true * * * then this certificate shall be null and void;" and the application concludes with an agreement, signed by the applicant, that the declaration therein "shall be the basis of the contract, * * * and that if any misrepresentations, or fraudulent or untrue answers have been made * * * then this agreement shall be null and void, and all moneys which have been paid shall be forfeited to the association." By the effect thus stipulated to be given to them, the intention of the parties to make these answers unconditional warranties is further and fully manifested. The statement of them as true is not qualified or limited by any reference to the knowledge, recollection, information or belief of the respondent. Therefore the honesty of his belief and statement, if shown, would be immaterial; but it is clear that the first and third of these answers—whatever may be thought of the second—related only to matters necessarily within his knowledge, in respect of which a warranty might well be required and given, and hence are not within the reason of the opinions in *The Masons' Benevolent Society v. Winthrop*, 85 Ill. 537, and *the Continental Ins. Co. v. Rogers*, 119 Ill. 474. Their materiality is apparent upon their face, independent of any express agreement that they should be so regarded. Nor was the legal effect of these warranties at all modified or changed by the negative answer of the respondent to the question in the application whether he

believed himself to be free from all diseases, hereditary or otherwise, tending to shorten life—an answer which, in view of his positive statements concerning his own health and that of his parents, may well be suspected to have been given under a misapprehension of the question—nor by the facts, if they were facts, that he was in good health at the time of his application, and that his death was the immediate effect of a strain or other cause thereafter arising. We are therefore of opinion that the instructions given to the jury on this point were substantially correct.

It is also complained that Mrs. Gilmore was allowed to testify to the fact of hemorrhage on mere hearsay. We think, however, that the fact of hemorrhage was not the subject of the inquiry made of her, and that she did not testify to it at all. It was with reference to the time when she heard of the hemorrhage that she was asked to fix the time of her visit to the applicant's house, when, as she had stated, he was sick.

Perceiving no material error in the record the judgment will be affirmed.

Judgment affirmed.

JOHN McNULTA, RECEIVER, ETC.,

V.

JOHN R. LOCKRIDGE, ADMINISTRATOR, ETC.

Railroads—Personal Injuries—Pleading—Action against Defendant in Representative Capacity—Plea of General Issue—Responsibility of Receiver for Negligent Acts Done under his Predecessor—Careful Habit of Deceased—Evidence of, When Admissible—Judicial Notice—Instructions.

1. In an action against a receiver in his representative character, allegations in the declaration of the orders of court appointing the defendant and his predecessor, are admitted by a plea of the general issue and need not be proved.

2. Petitions on file for the removal of the case to the Federal Court, in which the defendant alleges his appointment as receiver by such court, can be judicially noticed by the court and avoid the necessity of proof of defendant's appointment as receiver.

32	86
137	270
32	86
52	233

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3. Where an injury is received through the negligence of the servants of a railroad corporation in the hands of a receiver, the action for such injury is properly brought against the receiver of the company at the time the action is brought, though he was not the receiver at the time the accident occurred.

4. Where there is no living witness of an accident causing the death of the person in question, evidence as to his habits, whether careful or otherwise, is admissible in an action against the party through whose alleged negligence the accident occurred.

5. Refinements in verbal criticism upon instructions are not to be encouraged and will not lead to the reversal of a case where it appears that the jury were not misled.

6. It is not error for the court to decline to give instructions which are but repetitions in substance of those already given.

[Opinion filed November 23, 1889.]

IN ERROR to the Circuit Court of Christian County; the
Hon. JAMES A. CREIGHTON, Judge, presiding.

MESSRS. JOHN G. DRENNAN and GEORGE B. BURNETT, for
plaintiff in error.

MESSRS. RICKS & CREIGHTON and PATTON & HAMILTON, for
defendant in error.

Counsel seem to regard the judgment in the case as being against McNulta personally. The judgment is against McNulta as receiver, to be paid in due course of the administration of the trust.

No execution is ordered against him personally or officially. The argument of counsel proceeds upon the theory that in this suit an effort is made to make one man liable for the torts of another, which every one will concede can not be done. Had this suit been brought against McNulta, simply, it requires no argument to show that no recovery could be had against him for the negligence of Cooley. It is well settled that an action of this character can not be maintained against a receiver personally for the negligence of his servants while transacting business as a receiver. Beach on Receivers, Secs. 715-18; Woodruff v. Jewett, 37 Hun, 205; Commonwealth v. Runk, 26 Pa. St. 235; Davis v. Duncan, 19 Fed. Rep. 477;

Wait on Insolvent Corporations, Sec. 242; 2 Rohrer on Railroads, 898.

It is also claimed by counsel for plaintiff in error, that in the present instance defendant in error has his action against Cooley, notwithstanding he is no longer receiver, but in this they are not supported by authority. Beach on Receivers, Sec. 720.

If this suit can not be prosecuted, defendant in error is remediless, because no action can be maintained against Cooley, since he is no longer receiver. A receiver is an officer of the court, and the property in his hands is in *custodia legis*, and can not be reached by execution.

The direct question has not been passed upon by any court of last resort, that we are aware of, and we presume counsel for plaintiff in error have found no published opinion on the subject, or they would refer to it.

We take the liberty, however, of stating that Judge Gresham, in passing upon the motion to remand these cases, very emphatically repudiated this same proposition, then vigorously urged by Mr. Beale, one of the attorneys for the receiver.

It has been decided also, that if a receiver who has commenced a suit in his name, be removed, his successor may be substituted as plaintiff in his stead, and that the death of the first receiver after the substitution of his successor, will have no effect upon the action by way of abatement. *Sheldon v. Adams*, 27 How. Pr. 179; same case, 41 Barb. 54; *Searcy v. Stubbs*, 12 Ga. 437; Beach on Receivers, Sec. 692.

Suits pending against a corporation are not abated by the appointment of a receiver. *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199; *T. W. & W. Ry. Co. v. Beggs*, 85 Ill. 80; Wait on Insolvent Corporations, Sec. 248.

PLEASANTS, P. J. On the 15th of January, 1887, James Molohon and his wife, in attempting to cross the Wabash railroad at a public crossing, in a sleigh, were struck and killed by a locomotive engine of the Wabash Railroad Company. In July following, the defendant in error, their administrator, brought two suits against the receiver of said railroad com-

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pany for the alleged injury. The process and declaration being alike, except as to the name of the decedent, the two cases were consolidated by agreement, and tried as one. It was alleged that at the time of the injury complained of the railroad was being operated by Thomas M. Cooley, as receiver, appointed by an order of the United States Circuit Court, and that on the first day of April, 1887, the plaintiff in error was, by like order, appointed his successor; and the specifications of negligence alleged in the counts respectively, were (1) that the statutory signals were not given on approaching the crossing; (2) that trees, shrubbery, etc., were permitted to remain on the right of way upon and about the crossing, which obstructed the view of persons traveling on the highway, and prevented the deceased from seeing the engine in time to avoid it, and (3) that the engine was driven at a high and reckless rate of speed, to wit, of forty miles an hour. All of these acts and omissions were charged against said Cooley, as such receiver, or his servants.

A general demurrer interposed to the declaration and to each of the four counts thereof was sustained as to the first but overruled as to the others, which contained, respectively, the charges above stated. Thereupon the general issue was filed, on which alone the trial was had. Upon the close of plaintiff's evidence in chief, the defendant asked the court to instruct the jury that upon that evidence he was not entitled to recover, which was refused; and thereupon the trial proceeded, and resulted in a general verdict and special findings for the plaintiff for \$6,000. A new trial was denied, and judgment entered upon the general verdict. The errors complained of are all in giving and refusing certain instructions, and overruling the motion for a new trial.

First, the instruction refused as just above stated, which was asked on two grounds: that the orders appointing Cooley and McNulta were material and alleged, and yet no proof of them was offered; and that there was no pretense of proof of any negligence on the part of McNulta, as receiver or otherwise, or of his servants.

These orders, we apprehend, were material and alleged

only as characterizing the defendant, who was sued as the receiver, succeeding Cooley, of the Wabash Railway Company—an official and representative character. In that character he was charged, that is, alleged to be chargeable, for certain specified “grievances,” among which was not the fact that he was the receiver, succeeding Cooley, of said company, for that fact would not be, in contemplation of the law, a grievance. In answer to that charge the defendant says “the said defendant”—who is not John McNulta, but “John McNulta, Receiver,” etc.—“comes and defends the wrong and injury, when, etc., and says he is not guilty of the said supposed grievances” etc., and “of this” alone he “puts himself upon the country.” He might have said, and we may well suppose he would have said, if it had been true, that he was not the receiver, etc.; but he did not. He impliedly admitted that he was such receiver, by designating himself as the defendant who was sued, and not denying the allegation of his receivership. Such we understand to be the sense and, as a rule, the effect of the general issue pleaded by one who is sued, not as an individual, but in a special character. Stephen on Pl. 158. Where the injury alleged is to the relative rights of the plaintiff, it puts in issue also the relation out of which they are claimed to arise, since that involves the exercise of the right. Conant v. Griffin, 48 Ill. 414; 1 Chitty on Pl. 472. But it does not put in issue the character in which the defendant is sued. 1 Ch. Pl., Marg. p. 478 (9th Am. Ed.). Hence, in this case, there was no need of evidence to prove this allegation, however material. The same reasoning applies to the alleged appointment of Cooley.

Besides, the record shows an order of the court removing these causes to the United States Circuit Court, upon petition of the defendant setting forth that he was sued as receiver, etc., and sought to be charged as such for the tort or wrong of Cooley as his alleged predecessor in such receivership or of his servants, “without first having obtained the leave of the said Circuit Court of the United States,” and that the right of plaintiff to bring or maintain the action involved and required the construction of the act of Congress, approved

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March 3, 1887, which provides by Sec. 3, that "every receiver * * * of any property, appointed by any court of the United States, may be sued in respect of any act or transaction of his, in carrying on the business connected with such property, without the previous leave of the court in which such receiver was appointed." We understand from the petition itself and from the argument here, that the particular part of the act supposed to require construction was the phrase, "for any act or transaction of his," presenting the question whether such receiver may be sued without such leave for the act or transaction of his predecessor. We also understand that the averment in the petition, that this question was involved, and a construction of that phrase in the act of Congress was required, meant that it was necessarily involved and required. But this was not true unless the defendant was in fact such receiver and Cooley was his predecessor; for the question could have been eliminated and the necessity of such construction avoided by a plea denying that he was receiver. The petition, then, was an admission of his receivership, of which the court below, to which it was made, could take judicial notice.

The other ground of the instruction was that the injury, if any, was proved, as it was also charged, to have been done under the administration of Cooley and not of the defendant. It is contended that for such an injury the defendant can not be held liable because neither he nor his servants committed it, and that the action for it can be maintained only against Cooley or his servants, who did commit it. This would clearly be true of an action brought to enforce a personal liability for such an injury, and the proposition is here contended for upon principles applicable to such an action. As here presented the question is conceded to be a novel one. Counsel confess that they have been unable by the most diligent search to find an authority directly upon the point, excepting an assertion in *Kerr v. Little*, 39 N. J. (Eq. R.) 83, and this, with the provision of the act of Congress above quoted, is all that is cited in the brief.

That case was a suit in equity against the receiver of the Cen-

tral Railroad Company, of New Jersey, for damages for the breach of a contract made with the complainant by the late receiver, by which complainant was to remove from the engines the coal, cinders and ashes, and was to have the same for his labor. The defendant filed a general demurrer, and the question considered seems to have been that of equity jurisdiction. All that was said in the opinion bearing upon the point now before us was the following: " * * * the complainant alleges (and truly) that he is without remedy at law. He can not maintain an action against the present receiver on the contract, for he did not make it." No authority for the assertion was cited, and the reason given would apply to a suit against an administrator on a note of his intestate—a good reason where the liability sought to be established is personal, but ignoring entirely the effect of the special character in which the defendant is sued, and which is the decisive question involved. The jurisdiction was sustained upon the ground that complainant "had a claim upon the trust fund still under the control of that court."

So here, it is said that "no action can be maintained against one man for the tort of another where the relation of master and servant does not exist;" that "it is sought to make the defendant liable upon the sole ground that he succeeded to the operation of the property, in the operation of which, by another, the injury arose;" that "an administrator may operate machinery belonging to his intestate, and for the torts of his servants may be sued in an action at law," and "like a receiver, * * * before or after he has resigned his trust, but no action can be maintained against his successor for his acts;" that "in the present case the plaintiff has his action against Cooley," and that "if * * * Cooley has resigned, this does not in any way affect plaintiff's right to sue him; nor does the fact that defendant has succeeded him make the defendant liable" for his tort; and that "it is not pretended that the defendant sustained any relation to the servants through whose alleged negligence the injury was occasioned." The foregoing is all that is submitted by way of argument upon the point for the plaintiff in error, which counsel conclude by

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the statement that "upon what principle he can be made liable for their tortious acts is beyond our comprehension." We regret that counsel did not consider and discuss for our help the only principle upon which, as it occurs to us, such a liability is or could be claimed. The legal propositions asserted are true and elementary as to a personal liability. But none such is here contended for. The ground of plaintiff's claim is not stated as we understand it. It is not "solely" or at all that the defendant "succeeded to the operation of the property." A purchaser at judicial sale might have succeeded to that. Nor is it that he sustained any relation to the servants of Cooley, through whose alleged negligence the injury was occasioned. But it is the relation of Cooley to the railroad company and the continuation and identity of that relation in the defendant as his successor. In other words, the theory of plaintiff's case is that neither Cooley nor the defendant is personally liable; that the party really liable, whose means must pay the damages claimed, if they are ever paid, is the railroad company; that by reason of its condition and the relations that Cooley sustained to it, that liability could be enforced only through Cooley while he sustained those relations; that he has ceased to sustain them, and that the defendant now sustains them in his stead; and therefore that liability can now be enforced only through this defendant.

Since the question is new and its solution perhaps not clear a fuller discussion of it would doubtless have been of service to us. Without it we are inclined to the opinion that the present receiver was rightly made defendant. Plaintiff's right and remedy were strictly legal and the damages claimed unliquidated, making a case for trial by jury. The injury was alleged to have been committed by servants acting as such in the line and within the scope of their employment. Somebody, therefore, should be responsible as master. While in one sense they were servants of the receiver, being employed by him and subject to his direction, we apprehend that for all purposes affecting the question of responsibility, where the receiver was not personally in fault, the corporation was the master; indeed, that for such purposes the receiver was the

corporation; for in such case he clearly is not personally liable. Beach on Receivers, Secs. 715, 718; Davis v. Duncan, 19 Fed. Rep. 477; Commonwealth v. Runk, 26 Pa. St. 235; Woodruff v. Jewett, 37 Hun, 205. The court that appointed him is not, and so, if the corporation is not, then there is no responsible master, though the injury was caused by the negligence of servants, for which the master would be liable.

It is not claimed that the action should have been brought against the corporation by its proper name. By its own voluntary action it had forfeited for a time its authority and power to exercise its functions and franchises, including those of suing and being sued; and these had been lawfully transferred to and vested in Cooley, as receiver. The United States Circuit Court had suspended its power to collect claims, pay debts or suffer judgments, in view of its financial condition and the interest of its creditors. It is said, however, that the action should have been brought against Cooley—not against him personally, for it is not pretended that he was so liable, but as receiver. The action could be brought only by an administrator, to be appointed after the injury had been done. That would require some time. Just when the plaintiff was so appointed we do not now remember, but when the action was brought Cooley, as receiver, was *functus*—no longer in existence. We understand that he was therefore absolutely incapable of acting or being acted upon in that character. The court which appointed him had also divested him of all property, and discharged him of all rights, powers and duties as receiver; so that in that character he was no longer subject to any order even of that court. How, then, could he be served with process, or plead, or suffer judgment, or pay an execution? If process were returned as duly served upon him and he failed to appear or to plead, would the court allow a writ of inquiry to be executed, shutting out all defense, and judgment to go for the damages so assessed, to be paid out of moneys or property of the company, of which he had no charge or control, and for which he was in no wise responsible? Such a judgment would not be unjust to the company and its creditors, only because it would be utterly worthless, either as a

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warrant for any proceedings by way of execution, or as evidence of a claim. An action against him as "late receiver" would be an action against him personally which, as has been seen, would not lie.

Then who else but the present receiver, who was such when the action was brought, could be properly made defendant? And who else should? Who has a deeper interest or higher duty, or is better able to protect and defend the company against unjust claims, whether they originated before or during or since the administration of his predecessor? We regard the receiver as the corporation, under his name—not its agent or representative, for he is not constituted or appointed by it nor accountable to it, but for all the purposes contemplated by his appointment, the company itself. He is the agent of the court, acting under its direction, but for the stockholders, bondholders and other creditors of the company, and for the public, as the company itself previously did under the name by which it was incorporated. What is done by or to or for him, as receiver, is in legal effect done by or to or for the company. His agents and servants are the agents and servants of the company. Hence it is immaterial, so far as concerns its liability, under which of several receivers in succession a particular cause of action arose. If it binds either it binds the company, but the action upon it should be against the company, under the name of the receiver acting when suit is brought. Such practice seems to us better adapted to secure justice and fairness to all parties and interests concerned, and to involve less of incongruity than any other that has been suggested.

In respect to the merits of the case the contested questions of fact have been stated. It is admitted by counsel for plaintiff in error, that "upon all the issues made by the pleadings, except the observance of ordinary care on the part of Molohon at the time of the accident, and the operation of the railway by Thomas M. Cooley, and the appointment of defendant as his successor, the evidence was conflicting." This makes it unnecessary for us to review or discuss that evidence, and we do not propose to make further reference

to it, except to say that on the part of the plaintiff below it was not confined, as to any of these issues, to one or two witnesses, nor was it in our judgment such in character or amount as, standing uncontradicted, would barely make a *prima facie* case; but, compared with what opposed, it presented such a question of preponderance as makes its determination by the jury decisive. The issues, if any, as to the appointment of Cooley and of the defendant as his successor in the receivership, have also been disposed of. Upon the only one remaining, that of due care on the part of the deceased at the time of the accident, no direct evidence was introduced or offered, because, as it appeared, no one was able from actual observation to so testify in regard to it. No one living witnessed the accident. The engine was a "wild" one and backing. At the time of collision and for some little time before, the persons upon it were facing and looking the other way. They had not observed the deceased approaching the crossing, nor was anybody else near enough to see how, as to care, they made the approach and came upon the track. But it was shown that the deceased was familiar with the crossing, had frequently driven over it, and was of a careful habit. To the evidence of his habit objection was made, but overruled, and we think rightly—the Supreme Court having expressly held it to be in such case proper. *C. R. I. & P. Ry. Co. v. Clark*, 108 Ill. 113; *Gardner v. C., R. I. & P. Ry. Co.*, 17 Ill. App. 262. To meet this the topography of the locality, the condition of the right of way and of the highway, and all the circumstances in evidence tending to rebut the inference as to his conduct, on the occasion in question, were before the jury, and doubtless urged for all they were worth. We see no sufficient reason for interference with their finding, and therefore no error in refusing to set aside the verdict on the evidence.

It is said the fourth instruction given on behalf of plaintiff was erroneous, because it limited the inquiry as to the exercise of ordinary care by the deceased, to the time they were killed, and to the time they were in the act of crossing the railroad track; that however negligent they may have been, in failing

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to look or listen for, or to heed signals of the approach of the engine, if, while attempting to cross, and at the time they attempted to cross the railroad track they were exercising ordinary care and caution, this, according to the instruction, would be sufficient. We are aware that some courts, on some occasions, have come very near to a recognition of this fineness of verbal criticism, but can not help thinking it unfortunate for the cause of justice. We do not understand that one can justly be said to be in the exercise of ordinary care in attempting, or at the moment of attempting, an act which he knows, or ought to know, is dangerous. If he did not exercise due care to ascertain whether it was dangerous to attempt it, and was injured in the attempt, then the attempt itself was careless, however careful the manner of it. Blondin doubtless exercised the utmost care in the manner of his attempt to wheel a man in a barrow on a rope over the chasm below the falls of Niagara, for the very reason that he knew the attempt was dangerous, and succeeded; but if he had failed would anybody say that in the act, or at the time of the act, he was in the exercise of care? The jury, doubtless, understood the instruction as including what counsel insist should have been expressed. Counsel so understood it, as appears from the quotation last made from their argument, for they speak of the issue as to care by the deceased, as care "at the time of the accident." We are unwilling to take the risk of doing injustice by recognizing any force whatever in this criticism.

It is also complained that the court refused an instruction asked by the defendant, to the effect that if the deceased failed to exercise slight diligence to discover the approach of the engine, and was killed in consequence of such failure, the plaintiff could not recover, even though the servants in charge of the engine were guilty of gross negligence. Such, no doubt, is the law, but it was given in every instruction that required the jury to find, from the evidence, as a necessary condition to a verdict for the plaintiff, that the deceased exercised ordinary care in the premises. We are much inclined to discourage a practice which tends to defeat judgments on

verdicts for no better reason than that the court declined to give instructions which were but repetitions in real substance of those given, but were calculated, by a different form of expression, to convey to jurors the idea that they set forth a different principle, and one more favorable to the case of the party asking it.

Perceiving no substantial error in the record the judgment will be affirmed.

Judgment affirmed.

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ELIJAH C. FINNEY, SURVIVING PARTNER, ETC.,

V.

GEORGE F. HARDING.

Landlord and Tenant—Rent—Lien on Crops—Construction of Statute—Bona Fide Purchaser.

A *bona fide* purchaser of farm crops from a tenant, takes them subject to the lien of the landlord under the statute, for unpaid rent. The statute itself gives to such purchasers of this class of property sufficient warning to put them on inquiry

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Douglas County; the Hon. C. B. SMITH, Judge, presiding.

Messrs. ECKHART & MOORE, for appellant.

Mr. WILLIAM J. AMMEN, for appellee.

The position and claim of appellee on the question presented for consideration by this court is, that the statute means just what it says, and that in all those cases where the lien given by the statute attaches at all it attaches as against the world and remains in full, absolute and perfect effect against the world during the time limited by the statute.

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unless, in the meantime, the rent secured by the lien has been paid, or the landlord has, in the meantime, waived the lien or put himself in such a position that he will be estopped from asserting it.

Under the position assumed by appellee the question of notice is wholly immaterial, except the principle that all are charged with notice of the law, and a *bona fide* purchaser, without actual notice of the facts of tenancy, etc., is not and can not be, in the very nature of things, in any better position, as regards the lien, than a purchaser with full notice of all the facts.

This position and claim of appellee we think correct and sound on principle and abundantly sustained by authorities. *Matthews v. Burke*, 32 Tex. 419; *Kennard v. Harvey*, 80 Ind. 37; *Davis v. Wilson*, 8 S. W. Rep. 151.

PLEASANTS, P. J. Appellee, a resident of Chicago, made a lease in writing to Matthias Klein of a quarter section of land in Douglas County for one year from March 1, 1886, at a cash rent of \$480, payable on or before the first day of January next following, and providing among other things that the crops should not be removed until the rent was paid. In August and December, 1886, appellant, for his firm, which then was and for some years had been engaged in the business of buying and shipping grain at Tuscola, about three miles from the demised premises, purchased of the tenant oats and corn raised on said premises, of the value of \$227.16, and paid him therefor in good faith and without any actual notice that he was a tenant or that the grain had been raised on demised premises. About the first of January, 1887, Klein left the farm and the county, wholly insolvent and with \$380 of the rent unpaid. Appellee brought this suit to the October term, 1887, in assumpsit on the common counts and a special count setting out the facts, to which the defendant pleaded the general issue, which was tried by the court without a jury, under a stipulation that the form of action might be disregarded and any legal claim or defense shown. Judgment was given for the plaintiff for \$227.16.

There is no disagreement about the facts, and the only question made is whether the grain mentioned was subject, in the hands of these purchasers, to the lien given by the statute, which declares that "every landlord shall have a lien upon the crops grown or growing upon the demised premises for the rent thereof, whether the same is payable wholly or in part in money or specific articles of property, or products of the premises, or labor, and also for the faithful performance of the terms of the lease. Such lien shall continue for the period of six months after the expiration of the term for which the premises were demised." 2 Starr & C. 1504, Sec. 31.

Although this statute, with immaterial variations, has been in force for nearly a quarter of a century, and the Supreme Court has determined the landlord's right there under as against execution and attachment creditors of the tenant, and purchasers with actual notice of the lien, it does not appear to have done so directly, as against a purchaser for value without such notice. The Appellate Court for the second district, however, has recently held in favor of such purchaser. *Howe v. Clark*, 23 Ill. App. 145.

If we were at liberty to regard it as authority, that case would be decisive of this; but we are not, and an independent consideration of the question being forced upon us in the case at bar, we have been constrained, with all due regard to the opinion of that court, to differ from it. That opinion was • thought to be sustained by inference from what had been held by the Supreme Court by the weight of authority in other States, and by sound reason.

The only decision in this State from which such an inference was claimed to be deducible, was that of *Prettyman v. Unland*, 77 Ill. 206. There the Circuit Court at the instance of the plaintiff had instructed the jury that if the defendants purchased the grain with notice of his lien they were liable, but refused another, to the effect that such notice need not be in writing, and for this refusal the judgment was reversed. It is asked why so, if no notice was necessary? We conceive a sufficient answer to be that plaintiff was not bound to risk any doubt of the sufficiency of the statute alone, as notice, and

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might well choose not to do so, when he thought he could clearly prove actual notice; that he did in fact put his claim on the ground of actual notice, and made his proof to correspond, but not in writing; that the instruction given was based on that theory and presentation of his case, and therefore the one refused was a material supplement, even if he might have recovered, upon a different presentation, without any proof of actual notice. Without that instruction the jury might understand, from the case as presented and the instruction given, that such proof was necessary, and, from some notion of the registry laws or other supposed reason, that the kind of proof made was insufficient, and so disallow his claim. They did for some supposed reason or without reason find for the defendant, and therein were wrong as to a considerable part of it. If the verdict had been the other way and the defendants had complained of an instruction as improperly defining notice, the Supreme Court might well have affirmed the judgment, however faulty the instruction, if they were of opinion that no actual notice was required, and if they had condemned the instruction and yet affirmed the judgment, the inference would be that such was their opinion. But a contrary inference does not seem to be warranted by the reversal under the circumstances as they appear, and that the court did not so intend or understand is probable from the fact that in the later case of *Hunter v. Whitfield*, 89 Ill. 229, they expressly declined to intimate an opinion upon the question. The record in the *Prettyman* case did not present it, directly or indirectly, but did require the ruling made. As authorities from other States, supporting their conclusion, the Appellate Court cite only the following: *Nesbitt v. Bartlett*, 14 Iowa, 485; *Westmorland v. Wooton*, 51 Miss. 825; *Scaife v. Stovall*, 67 Ala. 237; *Webb v. Sharp*, 13 Wall. 330; *Fowler v. Rapley*, 15 Wall. 14; *Beall v. White*, 94 U. S. 382.

Under the Iowa code the landlord has a lien upon the crops and also upon "any other personal property of the tenant which has been used on the premises during the term, and not exempt from execution," for the period specified. As to such other property as was intended for sale in parcels from

time to time and with a view to replenishment, like a stock of merchandise or live stock on a farm, the landlord might well be presumed to have assented to such sales—the mass being expected to be kept good, and so his security thereon unimpaired. In the case cited the property purchased was a cow, which “was a part of the stock of the farm intended for sale, as his course of business, governed by his interest and the market, would require;” and on the reasoning above indicated it was held that the purchaser was protected. So the same court say, in the later case of *Richardson v. Peterson*, 58 Iowa, 724, in which a team of work horses, kept by the tenant for use and not for sale according to his ordinary business, was held to be subject to the landlord’s lien, although the claimant had purchased in good faith without actual notice of it; and in the still later case of *Holden v. Cox*, 60 Iowa, 449, that of *Nesbitt v. Bartlett* was expressly held to have no application to crops, and the statutory lien upon them declared paramount. In the Mississippi case the property in question consisted of two bales of cotton. The landlord, having demanded them of the purchaser and been refused, brought the suit to recover their value; and it was held that while he had a lien upon it which entitled him to resort to the property in the manner prescribed by the statute, he had not such a right as would “entitle him to maintain trover or assumpsit against the purchaser.” The question here involved was not considered; and afterward, in *Dann v. Kelly*, 57 Miss. 375, the court expressly declined to give an opinion upon it. In the Alabama case the statute is not quoted, but the court say its “reasonable implications support their view;” and the provisions from which these implications are supposed to arise would seem to be that to the lien of the landlord is expressly given “priority over all other debts,” but the claims of purchasers are not mentioned; that to enforce it an attachment may be levied upon the crop before the rent falls due, in case of its removal or intended removal, and upon its proceeds in case of sale. From the expression as to creditors and silence as to purchasers, it is argued that the latter were not intended to be affected by the statute, but that

their case was left to the operation of the common law, and, from the other provisions referred to, that a purchase without notice was contemplated as a discharge of the property in the hands of the purchaser, and that the only guard against the danger or relief against the effect of such sale intended to be afforded by the statute, was the special right of attachment mentioned. There is no need to question the force of this argument from the code of Alabama, since none such can be drawn from that of Illinois.

The three cases cited from the Federal Reports arose under the act of Congress which gave to landlords in the District of Columbia what it designated as a "tacit lien" upon property on the demised premises, and provided for its enforcement, among other ways, by action against "purchasers with notice." Neither of them involved the question here under consideration, nor do we find in either anything pertinent to it, except a *dictum* in the first (13 Wall. 330) to the effect that the law protects purchasers without notice against the landlord's lien; but the context, immediately following, clearly shows that in that remark Justice Bradley had reference to articles intended for sale, sold in the ordinary course of business and thereupon removed from the demised premises—citing, most particularly, the case of *Grant v. Whitwell*, on which that of *Nesbitt v. Bartlett*, afterward explained as has been seen and held inapplicable to crops—was expressly based. But in each of the others, which also cite the same authority, the court said that a statutory lien has the force and effect of a common law lien with possession, which we understand to be valid, unless waived, as against any purchaser.

Counsel for appellant in argument here cite still other cases, which we notice as briefly as we may and be understood. *Thornton v. Carver*, 6 S. E. Rep. 915, appears to be subject to much the same explanation as the one from Alabama, *supra*. The Georgia statute expressly mentions only "all other liens, except liens for taxes," as being postponed to that of the landlord, and makes sale by the tenant a misdemeanor, punishable by fine in double the sum the lien was given to secure, of which one-half is to go to the landlord—"thus,"

as the court say, "paying the debt." The property in question was cotton—a staple production of the State, generally consigned to warehousemen at a distance, for sale, of whom it was bought as in the open market, without any knowledge of the producer, and passed by delivery, according to the custom of trade, "almost like bank bills." Furthermore the court, as in the Alabama case, regarded this statutory lien as a "secret lien," existing "in the breast of the landlord only." And so, upon supposed implication from the provisions and language of the act, and upon grounds of public policy and common law principles, the purchaser without notice was held to be protected against it. *Haifley v. Haynes*, 37 Mich. 535, involved the construction of an act which gave to laborers employed in getting out lumber, a lien for their services, paramount to all other claims upon the property, but further declaring that it should cease to exist after the expiration of thirty days from the completion or last day of their service, if within that time no statement or petition was filed, and at the end of three months from such filing, unless meanwhile a suit to enforce it was commenced, for the reason that the laborer was protected, first, by possession, and second, by his right under the act to file his statement or petition immediately upon the completion of his service, without waiting thirty days or any other time. The court held that, if he surrendered the possession to his employer, and neglected to file his statement or petition until the property was sold, after such completion, though within the thirty days, the purchaser would hold it discharged of the lien. "He may infer that no lien is insisted on." However it may have been in law, it seems this decision was in fact a misinterpretation of the mind of the legislature; for at their next session after its promulgation they removed all doubt by an amendment declaring that no sale of the property during the time allowed for filing the statement or petition, and previous to the filing thereof, should in any way affect the lien; and clearly it is not at all pertinent here.

Smith v. The Shell Lake Lumber Co., 68 Wis. 89, was under a statute precisely like that of Michigan before the

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amendment, and followed the case last mentioned—one of the justices strongly dissenting. *Alexander v. Mahon*, 11 Johns. 185, and *Rensselaer v. Quackenboss*, 17 Wend. 34, were contests between execution liens and that of the landlord, under an act stated by the court in the first to be almost an exact transcript of the statute of 8th Anne, Chap. 14, which is not in force here. *Herron v. Gill*, 112 Ill. 247. The question before this court was not involved nor referred to; and if it could be claimed that the construction there put upon that statute shall have any bearing upon it, from analogy, the answer would be that our own Supreme Court has repeatedly held directly, that under our statute the landlord's lien has preference over executions, and no notice thereof in such case is required. So, also, of *Craddock v. Riddlesbarger*, 2 Dana, 205. The above, we believe, are all the authorities from other States relied on by appellant, and for the reasons indicated they seem to us to give but little if any support to his contention.

Counsel for appellee has cited a very much larger number as being to the contrary. And while, as to many of them, their force in application here may be more or less abated by like considerations, we think the decided weight of authority is on that side. In Iowa, Indiana, Texas and Tennessee, particularly, the statutes appear to be most nearly like ours, and in each of those States, upon the direct question between the landlord and the purchaser without actual notice, the lien has been sustained. The Iowa cases have already been cited. *Kennard v. Harvey*, 80 Ind. 37; *Mathews v. Burke*, 32 Tex. 419; *Davis v. Wilson*, 8 S. W. Rep. (Tenn.) 151. For others referred to see *Gear on Landlord and Tenant*, Chap. 19, Sec. 141-7 and notes. We understand that the common law favored executions, giving them precedence over all debts that were not specific liens, and innocent purchasers as against secret liens, and that it gave the landlord no specific lien for rent, but only a right to distrain personal property on the demised premises. Yet the legislature had power to give it, absolutely, or with such qualification as it should think proper. When its will on the subject is duly and plainly declared the

courts are to give it effect according to the intention thus made known, and without regard to the common law in relation to it or to the wisdom or policy of the enactment.

It has not been contended that our statute contains a word or phrase of doubtful or obscure meaning, or any that suggests or leaves open a question as to the extent of its application. All agree that a "lien" is a charge upon and right to resort to the thing on which it operates, as a means of satisfying the claim it is given to secure. This is the right which the legislature has in terms declared to be given to every landlord, for rent of all kinds and however payable, upon all crops growing or grown on the demised premises, and to continue for six months after the expiration of the term. It excepts from its operation during that period no landlord, no rent, no crops so growing or grown, no adverse claim or interest. It is true that this lien is not expressly declared to be valid as against a *bona fide* purchaser without notice of it. But it is also not so declared as against execution, attachment or any other existing creditors of the tenant; and yet its superiority to their claims is beyond doubt. *Thompson v. Mead*, 67 Ill. 395; *Mead v. Thompson*, 78 Ill. 62; *Hunter v. Whitfield*, 89 Ill. 229; *Wetsel v. Mayers*, 91 Ill. 497. In neither of these cases is any reason given for the superiority, except that briefly stated in 67 Ill., that "the law creates the lien, and from its very nature, and under the statute, it must have precedence," which applies with equal force to the case of the purchaser. Yet we are asked to go outside of the statute, not to find any needed explanation of its terms or ascertain its real intention, but to see from the common law, the legislation of other States, and the effect on trade in agricultural products, that he ought to be excepted. This would be no construction, but judicial legislation. These considerations afford no ground for a presumption that our legislature overlooked and so excepted the claim of the purchaser, though it considered and postponed credits that might be given expressly upon the faith of crops to be made, for seed, team, implements or labor required to make them; that it meant what it did not say and did not mean what it did say. If the purchaser

within the lien period may, for want of actual notice, hold the property, then the landlord may, without payment and without his consent, fault or neglect, cease to have the right which the statute said should continue. For it indicates no means by which such notice may be given, and without such indication the landlord can not use or devise any that would certainly be effectual, since he can not know who will be the purchaser. And what further notice than that given by the statute itself should be required? "It is the commom doctrine," say the court, in *Watt v. Scofield*, 76 Ill. 264, speaking on the subject, "that what is sufficient to put a purchaser upon an inquiry is good notice of whatever the inquiry would have disclosed," and hold that a purchaser of corn, knowing it was raised on demised premises, but having no actual notice that the rent was unpaid, was not a *bona fide* purchaser and took it subject to the lien. So in *Mathews v. Burke*, *supra*, the Supreme Court of Texas, extending this reasoning, said of their statute, which gave the lien until the first day of January next after the maturity of the crop, that it "bade all purchasers of cotton to beware how they purchase until that time." Ours, also, notifies everybody that a certain species of property, easily recognized, is subject to a certain lien for a limited time, if only it is raised on demised land; and where the purchaser does not know to the contrary or has no satisfactory assurance thereof, how can he fail to apprehend that it may have been so raised, and thus be put upon inquiry? The kind of property offered him would naturally call to mind the caution of the statute in relation to it. This is a marked distinction between such a lien and one created by mere agreement of the parties—a distinction recognized by the court as affecting this question of notice in *Prettyman v. Unland*, 77 Ill., on p. 211. In this respect also we perceive a strict analogy to the liens of mechanics and material men, which make the decisions in relation to them pertinent and forcible, if not conclusive, here. For no other reason than that they are given by a public law, designating generally the kind of property made subject to them, these decisions have uniformly enforced them as against purchasers without actual

notice of them. Thus in *Clarke v. Moore*, 64 Ill. 279, it was declared that, "under the law it is the duty of those purchasing or taking liens on the property to ascertain, as best they may, whether it is incumbered with mechanics' liens, and they purchase it subject to such liens." And speaking of the landlord's lien (as against execution and attachment creditors, no case against a purchaser without notice having yet arisen) the court said: "The law creates the lien, and from its very nature and under the statute must have precedence, unless it has been waived or the landlord has been guilty of *laches*," and again declared it to be "a permanent lien, of which every person must take notice, and can be lost only by waiver and failing to enforce it at the proper time." *Thompson v. Mead*, 67 Ill. 395. These declarations were reiterated in *Mead v. Thompson*, 78 Ill. 63, *Hunter v. Whitfield*, 89 Ill. 229, also *Wetsel v. Mayers*, 91 Ill. 499, and must therefore be accepted as the deliberate and settled opinion of that court. If there be any solid ground of distinction between the lien of the mechanic and that of the landlord we do not perceive it.

It is true that in *Clarke v. Moore*, *supra*, Mr. Justice Walker said of mechanics' liens, that they were "secret," but with all deference we think the expression was not called for nor well considered. They have the force and effect of common law liens, with possession, which is not secret. They are created by statute and the statute is not secret. In the case of *Richardson v. Peterson*, 58 Iowa, 724, the court said: "The vendor of the personal property transfers the title and interest he holds therein, subject to the liens recognized by the law" (by which we understand is meant the statute). "This rule prevails in all cases except those wherein a purchaser without notice is protected by statute, as under the registry laws. If a statute creating a lien provides for no protection in favor of persons having no notice thereof, property subject thereto can not be transferred free from the lien, on the ground that the purchaser had no notice of its existence. Unless these principles be recognized the lien conferred by the statute above quoted would fail to give protection to the landlord."

Young v. Young.

We think our statute was intended to give real security to the landlord for his rent—to the landlord living at a distance from the demised premises (as in this case) no less than to one near by; that his principal peril was from lien creditors of the tenant and purchasers without notice, since he could protect himself as against the tenant and trespassers and purchasers with notice; that of itself it gave to all such creditors and purchasers a warning sufficient to put them on inquiry; that as to such creditors its efficiency has been authoritatively determined; and that to allow the lien to be defeated by such a purchase would make it substantially nugatory at a point where it most needed to be of force.

Appellant's firm, then, having taken the grain subject to appellee's lien and so disposed of it as to prevent his resort to it, should answer to him in some form of action for the injury thus done. In *Holden v. Cox*, 60 Iowa, 449, it was held that "whoever consumes or destroys personal property, upon which another has a lien, becomes liable to the lien holder in damages."

It does not distinctly appear that they converted this grain into money, though it might be so presumed from the fact shown, that their business was buying, shipping and selling grain. In that case we see no objection in principle to assumpsit for money had and received to appellee's use, as a remedy; nor, if otherwise, to an action on the case. The judgment is affirmed.

Judgment affirmed.

WILLIAM A. YOUNG
v.
JAMES W. YOUNG.

Set-off—Assigned Judgment.

A defendant can set off a judgment obtained by a third party against the plaintiff and assigned to the defendant before suit brought.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Vermillion County; the Hon. E. P. VAIL, Judge, presiding.

Messrs. J. B. MANN and WILLIAM A. YOUNG, in person, for appellant.

Mr. W. R. LAWRENCE, for appellee.

CONGER, J. The principal question presented by this record is, can a defendant, when sued, set off a judgment obtained by a third person against the plaintiff and assigned to the defendant, before suit is brought.

We think the doctrine is well settled that he can do so. Waterman on Set-off, 193, 365; Ford v. Stewart, 19 Johns. 343; Wright v. Cobleigh, 3 Fost. (N. H.) 32; Wilson v. Reeves, 4 Sneed (Tenn.), 173.

The Circuit Court refused to permit this to be done, which we think was error, for which the judgment will be reversed and the cause remanded.

Reversed and remanded.

A. J. WELCH

V.

JOSEPHUS MILLER.

Replevin—Instructions—Evidence.

1. In an action of replevin this court declines to consider alleged errors of the court below, it not appearing that injury resulted therefrom.
2. The use of the word "testimony" instead of "evidence," in an instruction to the jury, is not error.

[Opinion filed November 23, 1889.]

IN ERROR to the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

Welch v. Miller.

Messrs. JOHN T. LILLARD and E. E. DONNELLY, for plaintiff in error.

Messrs. ROBERT B. PORTER and W. E. GAPEN, for defendant in error.

WALL, J. This was replevin before a justice of the peace for twenty-one head of sheep brought by defendant in error against plaintiff in error. Defendant in error recovered before the justice, and plaintiff in error appealed to the Circuit Court, where he was again defeated. By writ of error the case is brought here. It is urged by counsel for plaintiff in error that the case is very close on the evidence and therefore it was quite important there should have been entire accuracy in the rulings of the court and in the instructions. The main question was as to the identity of the sheep, and while there was some conflict the issue was one which a jury is eminently qualified to try, and we are not impressed with the view that their conclusion was wrong, or even that it was of doubtful propriety.

The first objection is that the court permitted a witness to testify over the objection of plaintiff in error that it is possible for a man to recognize sheep by their countenance. It is urged by counsel that whether this is so, or to what extent it is so, is a matter of general information as to which a witness should not be permitted to speak. The court by an instruction advised the jury that whether sheep could be so recognized is a question of fact for the jury to determine, and in arriving at a conclusion the jury might consider their own and the ordinary experience of mankind.

We hardly deem it necessary to determine whether, by this instruction, the court wholly corrected the supposed error in admitting the evidence complained of. It is probably within the experience of every man, at all familiar with domestic animals, that there is in their countenance a means of identification, to at least a limited extent—stronger in some instances than others, and we can not see how this case was prejudiced by admitting proof of such a fact. The jury probably knew as much

about that matter as any witness, and probably relied upon their own experience in weighing the testimony of those witnesses who professed to recognize the sheep by their countenance and general appearance. No substantial harm was done by the evidence thus objected to, nor can we suppose as urged by counsel that the instruction referred to was calculated to mislead the jury by giving undue prominence to the point, or otherwise.

It is also insisted the second instruction was erroneous in telling the jury they should find for plaintiff if he produced a preponderance of the *testimony* instead of the *evidence*. This objection is hypercritical. We can not presume a jury would regard the word *evidence* as having a different signification from that of *testimony*. Testimony and evidence are often used interchangeably—as though they were synonymous, though in their primary sense they are not. There is nothing in this point. It is also urged that the third instruction is erroneous in saying that, “it is immaterial how plaintiff knows the sheep, if they in fact belong to him.” This was of course not very pertinent or helpful, but it can not be considered of sufficient importance to produce a reversal.

No other points are made. We find no error and the judgment will be affirmed.

Judgment affirmed.

82	112
98	*280

CITY OF DANVILLE

v.

MARGARET MAKEMSON.

Municipal Corporations—Defective Highway—Personal Injury—Negligence of City—Accident and Negligence Concurring—Estoppel.

1. The erection by a city of an embankment in a highway fourteen feet high and thirty feet wide, a street car track with rails three inches high running just to one side of the center line thereof, constitutes negligence.

City of Danville v. Makemson.

2. The use of a young and inexperienced horse does not necessarily constitute negligence.

3. The fact that the city has other streets, perfectly safe, which the plaintiff might have used, can not be urged in defense to an action for the recovery of damages for an accident due to its negligence.

4. Where a person, in the exercise of due care, is injured by the combined result of accident and negligence of a city, and the injury would not have occurred but for such negligence, the city will be liable.

[Opinion filed November 23, 1889.]

APPEAL from Circuit Court of Vermillion County; the Hon. E. P. VAIL, Judge, presiding.

Mr. GEORGE G. MABIN, for appellant.

Mr. W. R. LAWRENCE, for appellee.

WALL, J. The appellant was impleaded by the appellee in an action on the case to recover damages sustained by reason of the defective condition of a certain street, known as Williams street, within said city.

Plea, not guilty; trial by jury and verdict for plaintiff for \$900, upon which, a motion for new trial having been overruled, judgment was rendered by the Circuit Court.

The only point made by the brief of appellant is that the evidence does not support the verdict. It appears that the street in question is a public and common thoroughfare in the city of Danville; that the ground being naturally quite low at the point where the injury occurred, the city had constructed an embankment in the center of the street about fourteen feet high and about thirty feet wide at the top. South of the center line of this embankment a street car track was laid with iron rails projecting three inches above the surface. North of this track the space was fifteen feet wide. There was no guard or railing of any kind on either edge of this embankment. The plaintiff, with her husband, drove into the city in a two-horse wagon and passed onto this street. Presently one of the horses shied at a child's carriage, which was being pushed along the sidewalk, and the wagon in which

plaintiff was riding was overturned and thrown to the foot of the embankment, whereby the plaintiff was seriously injured. The negligence alleged is in not providing a guard or railing along the edge of the embankment. There is considerable evidence in the record as to the safety of the street as it was constructed, but we are not inclined to disagree with the conclusion of the jury that it was not reasonably safe. Nor is there any sufficient ground for the contention that the team was not properly managed, or that there was negligence in using one of the horses, which was young and somewhat unbroken. *City of Joliet v. Verley*, 35 Ill. 65.

It is also urged that the city had other streets which were perfectly safe and upon which the plaintiff might have entered the city. This street was devoted to public use, and under the circumstances and for reasons given by the witnesses it was the most convenient and accessible for the plaintiff. The city can not be heard to make the objection. The chief reliance of appellant seems to be in the position that the injury was due neither to negligence of plaintiff or defendant, but to the mere accidental circumstance that, from the cause named, the team took a sudden fright with the result stated.

It is the well settled rule in this State that if a person, while observing due care, be injured by the combined result of an accident and the negligence of a city, and the injury would not have been sustained but for such negligence, yet, although the accident be the primary cause of the injury, if it was one which common prudence and sagacity could not have foreseen or provided against, the negligent city will be liable for the injury. *City of Joliet v. Verley*, 35 Ill. 58; *City of Bloomington v. Bay*, 42 Ill. 503; *City of Lacon v. Pace*, 48 Ill. 500; *Village of Carterville v. Cook*, opinion recently filed at Mt. Vernon, unreported.

As already intimated we are of opinion the evidence sufficiently tended to show a want of proper care on the part of the city in permitting the street to remain at the point in question without protection, and it is also quite evident that the accidental fright of the team was not to be foreseen or guarded against in the exercise of such care as is ordinarily

Brewer v. Gobble.

required of those who use the streets of a city. The instructions, to which no objection is urged, very fully and properly advised the jury as to the law applicable in the case. The injury sustained by the plaintiff was quite serious and the amount allowed by the jury was entirely within reason.

Upon the whole we are of opinion that justice has been done and the judgment will be affirmed.

Judgment affirmed.

THOMAS BREWER

v.

O. H. GOBBLE.

Gaming—Contracts Void for Illegality—Wager—Payment before Decision—Action against Stakeholder.

A stakeholder who, before the wager is or can be decided, pays the money over to one of the parties, makes himself liable to the other party for the amount of his deposit.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. PALMERS & SHUTT, for appellant.

Messrs. T. S. CASEY and C. A. KEYES, for appellee.

CONGER, J. February 23, 1887, one Thomas Dolan and appellee Gobble made a wager, the terms of which were reduced to writing, as follows:

“SPRINGFIELD, ILL., February 23, 1887.

Agreement entered into between H. Gobble and T. Dolan:

We the undersigned hereby wager \$500 that J. M. Garland is not the next mayor of Springfield, T. Dolan taking the

affirmative, and we hereby put up \$40, respectively, that if the money is not covered by 5 p. m., February 24, 1887, the defaulting party loses this forfeit. We hereby respectively agree that Tom Brewer is appointed holder of forfeit and final stake.

(Signed) THOMAS DOLAN,
O. H. GOBBLE.

Witness: NEIL CULLOM.

Attest: A. J. MARKS.

Witness for all: H. WILLIAMS."

The money was placed in the hands of appellant as stakeholder by the respective parties. The election for mayor of Springfield was held more than a month thereafter and resulted in the defeat of Mr. Garland.

About two weeks after this wager was made and before the election was held which was to decide it, without any demand from Dolan, appellant paid him the money, seeking afterward to justify such conduct by telling appellee that he and others went to the council chamber and saw Garland, who was then mayor, sitting there as such, and that made him the *next* mayor.

If the law recognizes or requires any honesty whatever on the part of a stakeholder in dealing with the money placed in his hands by those entering into a wager, then the conduct of appellant was grossly dishonest. While the act of those entering into the wager was illegal, the act of appellant in receiving the money and agreeing to pay it to the winner was not.

As said by Shaw, C. J., in *Ball v. Gilbert*, 12 Metcalf, 397:

"We think it clear that in no proper sense can the stakeholder be regarded as a party to the illegal contract, or in *pari delictu*. He is a mere depositary of both parties, respectively, with a naked authority to deliver it over on the proposed contingency. If the authority is actually revoked before the money is paid over, it remains a naked deposit to the use of the depositor."

When appellee placed his \$500 in the hands of appellant with directions to pay it to Dolan upon the happening of a certain contingency only, and appellant, before the contingency happened and in direct violation of the duty imposed upon him to act in good faith toward appellee, gave

the money to Dolan, we think he became liable to appellee.

Appellee had a right at any time before the happening of the contingency which was to decide the wager, to revoke such wager and withdraw his deposit.

It is true that if the stakeholder pays the money over to the winning party before demand made upon him, or notice from the parties that the wager is revoked, it will be a protection, but we understand the cases that hold this doctrine to imply that such payment is honestly made by the stakeholder in accordance with the decision of the wager after the contingency has happened upon which it depends.

We have been referred to no case that decides this exact point, for in none of them was there a payment by the stakeholder to one of the parties before the wager could be determined; but it seems to us that the plainest principles of justice support it. If a stakeholder, before a wager is or can be decided, can pay the money over to one of the parties not entitled to it, and thereby defend himself from a suit for the recovery by the other of the amount deposited with him by such other, we see no reason why he may not pay it to a stranger or keep it himself with impunity. The contract between the parties to the wager is illegal and neither can enforce it, but the contract of each with the stakeholder is such as is implied by law when one deposits money with another, *i. e.*, that he will pay it out according to the directions given, or return it to the depositors; and such contract is legal and can be enforced.

We see no serious error in the instruction complained of, and believing that justice has been done, the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

EZRA M. PRINCE

V.

SARAH P. DULIN ET AL.

Replevin—Stipulation to Submit Case to County Judge—Judgment Thereunder—Right of Appeal—Damages on Affirmance of Judgment for Plaintiff.

1. A judgment in favor of the plaintiff in an action of replevin having been affirmed by this court, a stipulation was filed in the court below to waive order of affirmance, reinstate the case and submit it to the judge of the court: *Held*, that an appeal would lie from the judgment entered upon trial under the stipulation.

2. It having been determined in a chancery proceeding between the same parties that a note and chattel mortgage had been given by appellees to appellant to secure the performance of an original agreement between the parties, and that appellees had not complied with their part of it, this court holds that appellant was entitled to hold the property covered by the mortgage, or so much thereof as would cover the costs and expenses occasioned by appellees' failure to comply with their contract.

[Opinion filed November 23, 1889.]

APPEAL from the County Court of McLean County; the Hon. C. D. MYERS, Judge, presiding.

Messrs. E. M. PRINCE, *pro se*, and F. R. HENDERSON, for appellant.

Messrs. TIPTON & BEAVER, for appellees.

CONGER, J. This case was before us at the May term, 1888, and in the opinion filed November 23, 1888, will be found a statement of the facts.

Upon the filing of the order of affirmance in the court below, the following stipulation was filed:

STATE OF ILLINOIS, } ss. County Court, December term, 1888.
 McLean County. }
 EZRA M. PRINCE }
 vs. } In Replevin.
 SARAH DULIN ET AL. }

This cause having been affirmed by the Appellate Court, order of affirmance is hereby waived and this cause is reinstated on the docket of this court, and it is hereby agreed that the judge of this court shall summarily, without the intervention of a jury, hear such evidence as either party may desire to introduce, and determine the amount of damages, if any, that the plaintiff is entitled to recover of the defendants, and said court shall enter all orders and judgments, and all orders as may be necessary or proper to adjust the rights of the parties in the premises.

EZRA M. PRINCE,
 TIPTON & BEAVER,

Attorneys for Dulins.

Under this stipulation a trial was had, evidence heard, and the court entered a judgment in favor of appellant for \$20.

A motion is made to dismiss the appeal because, as it is alleged, the proceeding in this case was not a suit upon which an appeal would lie. We think the appeal would lie, and the motion will therefore be overruled.

We think the court erred in refusing appellant leave to show as damages all such costs and expenses as were occasioned by appellees failing to comply with their contract. In the chancery proceedings between these parties it was found by the court that the chattel mortgage in question and the note it secured for \$500 were to secure the performance of the original agreement entered into between the parties hereto, and that appellees had not complied with their portion of it; hence appellant is entitled to hold the property covered by the chattel mortgage or the money substituted for the property, or so much thereof as will cover the costs and expenses to appellant occasioned by the failure of appellees to comply with their contract.

The judgment of the County Court will be reversed and the cause remanded.

Reversed and remanded.

VINTON E. HOWELL, FOR USE, ETC.,

V.

OSBORNE BARNARD ET AL.

*Replevin—Fixtures—Real Estate Mortgage—Chattel Mortgage—
Foreclosure—Dismissal of Suit—Action on Bond—Evidence.*

1. In an action on a replevin bond, given by a party who sought to reclaim as fixtures covered by a real estate mortgage, certain property which had been taken on foreclosure of a chattel mortgage, the replevin suit having been dismissed and writ of *retorno* awarded, it is *held*: That a verdict for one cent damages was wrong, a portion of the property in controversy being clearly personal property.

2. In the case presented it is *held*: That the plaintiff in the replevin suit and defendant in the action on the bond, was not estopped by the allegation in his affidavit for writ of replevin that the property was personal property, from showing in mitigation of damages, that the property was actually real and therefore not covered by the chattel mortgage.

[Opinion filed November 23, 1889.]

IN ERROR to the County Court of McLean County; the Hon. C. A. MYERS, Judge, presiding.

In 1883, Jesse Bowen, being the owner of a brickyard west of the city of Bloomington, gave a real estate mortgage thereon to one Abbott. Abbott thereafter assigned the mortgage to Osborne Barnard, one of the defendants in error. The facts of the case further appear in the opinion.

MESSRS. KERRICK, LUCAS & SPENCER, for plaintiff in error.

MR. JOHN STAPLETON, for defendants in error.

CONGER, J. One Jesse Bowen was the owner of a piece of ground on which there was a brickyard, and as a part of the fixtures of the brickyard there were "one Aldrich wind-mill, tower force pump, and about 700 feet of pipe, water

Howell v. Barnard.

tank, loose lumber on brickyard, water elevator, pit covers and pit lumber, etc., etc., said property on the brickyard of Jesse Bowen, and of the value of \$100."

While that property was so in possession of Jesse Bowen he made a chattel mortgage on it to Warren Milner to secure the payment of \$164.82. The mortgage was properly executed and recorded. At the maturity of the mortgage the debt was not paid, and the mortgage was placed in the hands of J. K. Noble to foreclose. Mr. Noble took possession of all the property and left it with a custodian and then suit in replevin was brought by Mr. Barnard for the same property. The affidavit for replevin says, "that said goods and chattels are now in the possession of James K. Noble," etc. The deputy sheriff to whom the writ was delivered went with Mr. Barnard to the brickyard, and the property was shown to them, and Mr. Barnard said to the deputy: "I will receive it (the property) just as it is here." Barnard dismissed that suit and a writ of *retorno* was awarded, but the property was retained by Barnard, and thereupon suit was brought by the sheriff for the use of Warren Milner on the replevin bond.

To the declaration the defendants filed several pleas: 1. Property in Barnard. 2. That the goods, etc., were returned. 3. "Because they say that the said supposed goods and chattels in the said writ of replevin mentioned were, in reality, certain fixtures to certain real estate, and that said fixtures were not taken in pursuance of said writ or replevin, and that the possession was not changed."

The jury returned a verdict of one cent for the plaintiff, who made a motion for a new trial, which was overruled, and this writ of error sued out.

The judgment in this case must be reversed, because the loose lumber used about the yard and worth, as estimated by the witnesses, from \$10 to \$75, was unquestionably personal property and plaintiff should have recovered its value.

As to the other property we think the fact that Barnard had called it personal property in his affidavit for the writ of replevin, should not estop him when sued on his bond

from showing that it was fixtures, and not personal property. Having sued in replevin he should be held to pay the costs and all the damages accruing from such suit. But if he can show that the property is not plaintiff's, because from its nature it could not be covered by a chattel mortgage, he ought, in mitigation of damages when sued upon his bond, to be permitted to do so.

Even though proof going to show such property to be fixtures may tend indirectly to contradict the recitals in his replevin bond, still, to give effect to the 26th section of the chapter on replevin, and to avail himself of the rights given by that section, he should be allowed to do so.

We do not desire to express any opinion as to whether the other property in question was part of the realty or personalty. This is a question of fact to be determined by the jury upon another trial under proper instructions.

The judgment of the County Court will be reversed and the cause remanded.

Reversed and remanded.

DAVID ELMORE

V.

DRAINAGE COMMISSIONERS.

Drainage—Injury to Lands—Flowage—Negligence—Ditches—Insufficiency of—Quasi Corporations.

A drainage district, organized under the law in force in 1879, is a *quasi* corporation and not liable for the negligent acts of the commissioners, although they result in damage to private property.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Mason County; the
Hon. LYMAN LACEY, Judge, presiding.

Messrs. BEACH & HODNETT, for appellant.

Elmore v. Drainage Commissioners.

The drainage district is liable for overflowing the plaintiff's land as charged in the declaration. *Nevins v. City of Peoria*, 41 Ill. 502; *Jacksonville v. Lambert*, 62 Ill. 519; *Aurora v. Gillett*, 56 Ill. 182; *City of Pekin v. Brereton*, 67 Ill. 477; *Aurora v. Love*, 98 Ill. 521; *Seibert v. City of Brooklyn*, 10 N. J. 136; *City of Elgin v. Hoag*, 25 Ill. App. 650; *Pye v. City of Mankato*, 36 Minn. 373; *Wharton on Neg.*, Sec. 934.

Defendant corporation having authority by law to construct drains and ditches, the damages to be paid for by assessment under special proceedings is liable for negligence in the prosecution of such work, to persons damaged thereby. *Wharton on Negligence*, Sec. 262; *Gould on Waters*, Sec. 261; *Child v. Boston*, 4 Allen (Mass.), 41; *Emery v. Lowell*, 104 Mass. 13; *S. C.*, 109 Mass. 147; *Daily v. New York*, 3 Hill, 531; 3 Denio, 433; *Ashley v. Port Huron*, 35 Mich. 296.

The defendant corporation having been organized for the benefit of the land owners of the district by petition, which called it into existence, is therefore liable under the rule laid down in *Town of Waltham v. Kemper*, 55 Ill. 346, and cases there cited.

Mr. T. N. MEHAN, for appellee.

The appellees are not liable for such damages as are claimed in the declaration in this case, being a *quasi* corporation. *Dillon's Mun. Corporations*, Sec. 762; *Angell & Ames on Corporations*, Sec. 629; *Hill v. Boston*, 112 Mass. 344; *Riddle v. Prop'rs of Locks and Canals*, 7 Mass. 169; *Cooney v. Town of Hartland*, 95 Ill. 516; *Hedges v. Co. of Madison*, 1 Gilm. 567; *Waltham v. Kemper*, 55 Ill. 346; *Cooley's Constitutional Lim.*, page 247; *Trustees v. Schroeder*, 58 Ill. 353; *Hollenbeck v. Winnebago Co.*, 95 Ill. 148; *Symonds v. Clay County*, 71 Ill. 355; *Addison on Torts*, page 1298.

No judgment can be rendered against the defendant corporation, because it has no funds out of which such judgment can be made. *Hedges v. Madison Co.*, 1 Gilm. 567; *Hollenbeck v. Winnebago Co.*, 95 Ill. 567; *Commissioners v. Kelsey*, 120 Ill. 482; *Bartlett v. Crozier*, 17 Johns. 446.

The defendants are a "body politic" as well as a "body

corporate" by the State. Drainage Law, Sec. 75, Hurd's Statute, 1887; Drainage Law, Sec. 1, Statute 1885.

Appellees are not liable under the law of *respondet superior*, or the law governing master and servant or principal and agent. Dillon, Mun. Cor., Secs. 772, 773; *Trustees v. Schroeder*, 58 Ill. 353.

CONGER, J. The defendant corporation was organized under the statute in force July 1, 1879, providing for the organization of drainage districts, and to provide for the construction, maintenance and repair of drains and ditches, by special assessments on the property benefited thereby in the town of Mason City, Mason county, Illinois, the commissioners of highways being the drainage commissioners of said district. Appellant, while not a signer of the petition for the formation of the drainage district, is the owner of lands included in said district, and was assessed \$800 for draining said lands; after the payment by him of such assessment, the defendant, without his knowledge or consent, enlarged the boundaries of said district by taking in a large area of territory, including the greater part of the city of Mason City, which territory had a natural drainage for the water falling thereon in a direction opposite to the lands of appellant; and defendant, by a system of drainage, collected the water falling on said area, and discharged all the water into the ditches on the lands of appellant, which were too small to carry off the water without enlarging the same, and also performed the work so carelessly and negligently as to overflow and submerge appellant's land with the water from the territory so added to the district, and precipitated upon his lands. He thereby lost the crops planted thereon, and the use of the lands; and having called the attention of the commissioners to the condition of his lands without avail, brought his action in case against the corporation. The declaration contained three counts, charging substantially the above facts and negligence on the part of the drainage commissioners in the construction of the drains, and in connecting the drains and ditches of the added territory with the drains running through plaintiff's land, and negligence in failing to enlarge and give sufficient fall to the drains on

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appellant's lands, so as to carry off, without damage, the increased volume of water so discharged therein. A general demurrer was interposed to the declaration, and sustained on the ground that the corporation is not liable in an action for damages, and judgment rendered against appellant for costs, from which judgment he prosecutes his appeal to this court, alleging as error the sustaining by the court below of the demurrer to his said declaration.

We are inclined to think the demurrer was properly sustained for the reason there was no liability on the part of the defendant. We see no good reason for holding that a drainage district organized under the statute is not a *quasi* corporation governed by the same principles, in reference to being liable to such damages as are claimed in the declaration in this case, as counties, townships, school and road districts, as laid down in *Town of Waltham v. Kemper*, 55 Ill. 346. In that case it is said: "In the case of these *quasi* corporations, made so without their consent, duties may be imposed, and their performance compelled under penalties, but the corporators, who are made such *nolens volens*, are not and can not be considered in the light of persons who have voluntarily and for a consideration assumed obligations, so as to owe a duty to every person interested in the performance."

It is strongly insisted by appellant that in the formation of a drainage district under the statute, there is such a similarity in principle to cases where the inhabitants of cities and villages voluntarily seek and assume corporate powers, that the liability to actions like the present should be governed by the same rules.

A drainage district is formed under general laws. It is true the initiative movement is by individuals hoping to obtain some personal benefit from the formation of the district, but its officers are designated by law, not elected by the inhabitants of the district nor in any way responsible to them for their conduct, and hence, we think, there is no good reason for holding the district liable for the tortious and illegal acts of the commissioners.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

THE METROPOLITAN NATIONAL BANK

v.

JAMES W. RACE.

Negotiable Instruments—Note—Guaranty—Defenses—Banks—Payment of Checks Irregularly Signed—Credit Therefor.

The guarantor of a promissory note given to a bank can not defend in an action against him on the same by the bank, on the ground that the maker, a corporation which had been a depositor of plaintiff, had funds in the bank sufficient to pay the note, where the only basis for such claim is that the bank had credited itself with certain checks, paid by it, but which were irregularly signed, the same having been made and used by the officers of the corporation in its business and for its benefit, and where some months had elapsed since the payment of the checks (the bank book of the depositor having been several times balanced) and the bank had received no notice of dissatisfaction until the bringing of suit.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Macon County; the Hon. C. B. SMITH, Judge, presiding.

Messrs. SMITH & PENCE, for appellant.

Messrs. GEORGE W. PLUMMER and I. D. WALKER, for appellee.

WALL, J. This was an action of assumpsit by the appellant against the appellee upon a guarantee of a promissory note as follows:

“\$3,500.

CHICAGO, Sept. 1, 1887.

“Ninety days after date we promise to pay to the order of ourselves thirty-five hundred dollars at Metropolitan National Bank. Value received.

“RACE, PORTER & COMPANY.

“By L. L. RACE, Treas.

“Pay to the Metropolitan National Bank.

“RACE, PORTER & Co.

“By L. L. RACE, Treas.

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"We hereby guarantee the payment of the within note.

"Signed: J. W. RACE.

"CHARLES H. POTTER.

"One thousand dollars hereon, Dec. 5, 1887."

Race, Porter & Company was a corporation of which the stockholders were James W. Race (appellee), Lewis L. Race, T. D. Porter, Wm. L. Johnson and Charles H. Potter. Appellee was the president, T. D. Porter, vice-president and manager, Lewis L. Race was secretary and William L. Johnson was treasurer.

This organization continued up to May 19, 1887, when Porter and Johnson resigned their respective positions and Lewis L. Race was made treasurer. The defense to the action is based upon the theory that the appellant, holder of the note, had in its hands money belonging to Race, Porter & Co. as a depositor, sufficient to pay the balance due upon the note, and this theory is based upon the proposition that the bank had improperly paid certain checks and charged the amount thereof to Race, Porter & Company. It appears that when Race, Porter & Company opened its account with the bank, it gave instructions to pay no checks unless signed by Johnson as treasurer and countersigned by Lewis L. Race as secretary, and that this was pursuant to a by-law of the corporation which required all checks to be so drawn. The appellee, James W. Race, lived at Decatur and spent but a small part of his time in Chicago, where the corporation of Race, Porter & Company carried on business.

Seven checks signed by Johnson as treasurer and countersigned by Porter were drawn between May 14th and 17th, 1887, amounting in the aggregate to \$2,742.53. They were drawn while L. L. Race, the secretary, was absent from the city, and were paid by the appellant bank, but not until after certain representations had been made to the cashier, which satisfied him of the propriety of paying them although they were not countersigned by the secretary. The note in suit was given in renewal of a former note for the same amount, being for money loaned by the bank to Race, Porter & Company. The pass book was written up the 20th of May, 15th of

June, 8th of August and 13th of September, at which times all checks were returned. On the 5th of December \$1,000 was paid on the note and it seems that about or not long before that date, the corporation retired from business and the books and papers of the concern were sent to the appellee at Decatur, where he was engaged in mercantile business in his own name.

Although the disputed checks had been in the hands of Race, Porter & Co. from the 20th of May, appellee claims that the fact of their being drawn irregularly, without the signature of Lewis L. Race, the secretary, was not known by him until some time in December, when the discovery was made by his bookkeeper. He also testified that the corporation got no benefit from these checks. On the contrary, it appears very clearly as to the checks payable to Newell Bros. Mfg. Co. and Leroy Paine, the indebtedness of the corporation was discharged to the amount of \$1,030.33. The same is true also as to the check for \$62.50 payable to currency, which was for the salary of one of the officers of the corporation.

It appears quite satisfactorily that another check of \$850, which was the first of the deposited ones, was fully covered by the check of Chin & Co. for \$750 and cash \$100, so that the corporation lost nothing thereby, the transaction being merely an accommodation to Chin & Co. The remaining three checks for \$500, \$100 and \$200, respectively, were payable to "Currency" and according to the testimony of Johnson, and of Preston, the cashier, they were also accommodation or "swap" checks for the benefit of Chin & Co. and were covered by the check of Chin & Co., so that as to these the corporation lost nothing.

Although the appellee swore as already stated that as to these disputed checks the corporation got nothing, yet he was evidently giving his opinion merely, and according to the record he was in error as to this. It appears from Johnson's evidence that when he left the corporation the books were balanced and his account as cashier was found correct. This is not disputed, and although the cash books of the corporation

Metropolitan National Bank v. Race.

are copied into the record, our attention is not called to anything tending to disprove his statement in this respect. The stubs of these checks are not produced nor does it appear from any reference to or analysis of the bank accounts or of the corporation accounts that any money was paid out on the four last mentioned checks that was not covered or balanced in the manner stated. It follows that, as to these which aggregated \$1,650, the position of appellee that there was so much money remaining in the bank to the credit of Race, Porter & Company, which the bank might properly apply on the note, is not well taken. Is it so as to the three checks first mentioned which went to pay the indebtedness of the corporation? That the money drawn on them was so applied can not be doubted, but counsel for appellee say the bank has no right to pay the indebtedness of the corporation without its authority, and invoke the familiar principle that one man can not, by his voluntary act, make himself the creditor of another. The principle has no just application to the facts. The checks were not drawn in exact conformity with the well understood instructions, but they were drawn by officers of the corporation who were at the time in sole charge of its business, and though irregular in form, were for a business purpose within the scope of the corporate affairs, for the liquidation of corporate liability, and the benefit of the transaction in each instance was enjoyed by the corporation. Such enjoyment was doubtless a conscious enjoyment, for we find nothing tending to show that the corporation made any effort to again pay the debts thus discharged, or that, in the slightest degree, it ever repudiated the transaction. It must be presumed that it ratified and approved what it thus enjoyed, for it can not be supposed that in the ordinary course of business it was ignorant of the facts.

Take the principal item, the debts due to Newell Bros. Mfg. Co. for \$942.93; how can it be believed that the fact that it was paid was unknown, or that it was unknown that it was paid by this irregular check? So of the other two—one for \$87.40 to Leroy Paine, one for \$62.50 to currency. It is a very convincing, if not conclusive circumstance, that although

all these controverted checks were in the possession of the corporation from and after May 20th, no objection ever came to the notice of the bank until after this suit was brought.

Johnson testifies that the appellee saw and examined these checks at the time Johnson retired, and Preston, the cashier stated that he informed appellee about the 19th or 20th of May, that the bank had paid some checks countersigned by Porter, and that appellee made no objection, but as this is contradicted we lay it aside. Nor is it necessary to refer in detail to some other matters of evidence which are vigorously discussed in the briefs.

What has been stated will present the controlling facts in the case, and upon a full consideration of them, we are constrained to hold that the finding of the Circuit Court, a jury being waived, for the appellee, was erroneous, and so plainly so as to require a reversal at our hands.

We are, of course, not unmindful of the rules which are applicable in reference to the weight to be given to the verdict of a jury, or to the finding of a court where a jury is waived, and were this a case where the evidence is conflicting, merely, upon controverted points, we should not, of course, interfere; but in the view we take there is substantially no conflict as to the vital features of the case to which we have alluded.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

C. AULTMAN & Co.

v.

R. F. OSBORNE.

Sales—Separator—Warranty—Failure of—Note—Set-off.

In an action upon a promissory note given by the purchaser of a separator, the contention involving the questions of warranty and set-off, this court declines to interfere with verdict for the defendant.

[Opinion filed November 23, 1889.]

McLean v. County of Montgomery.

APPEAL from the Circuit Court of Christian County; the
Hon. JAMES A. CREIGHTON, Judge, presiding.

Mr. JOHN G. DRENNAN, for appellant.

Mr. J. C. McBRIDE, for appellee.

CONGER, J. This was an action brought upon a note executed by appellee to appellant for a separator sold by the latter to the former under a warranty as to its working qualities. The defense relied upon a failure of this warranty, and also upon a plea of set-off, to recover the value of a second-hand machine received by appellant in part payment of the new one purchased. Appellee recovered a verdict for \$75 upon which judgment was rendered.

We have carefully examined the evidence and the instructions, both those given and refused.

It would serve no useful purpose to set out at length the great variety of points elaborated in the briefs, but we are satisfied that the law was fairly given to the jury, and that substantial justice has been done between the parties, and therefore the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

JOHN J. McLEAN

v.

THE COUNTY OF MONTGOMERY.

Clerks—Compensation of—Fees in Criminal Cases—Power of County Board—Estoppel—Evidence.

1. Where a circuit clerk has actually collected as fees of his office a sum equal to or greater than his salary, but has out of such sum paid deputy hire and other necessary expenses of his office, so that the amount unexpended is not sufficient to pay his salary, the county board has no power under the statute to allow him fees in criminal cases sufficient to make up the balance of his salary.

2. Where a county board has audited and allowed the payments made by a clerk for deputy hire and other expenses of the office, thereby reducing the sum actually collected by the clerk as fees below the amount necessary to pay his salary, and afterward, contrary to the statute, allowed him fees in criminal cases to make up the deficiency, the county is not estopped from recovering from the clerk such illegal allowance.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Montgomery County;
the Hon. J. J. PHILLIPS, Judge, presiding

This was an action in assumpsit brought by the county of Montgomery against John J. McLean to recover from him certain moneys paid to him from the county treasury of Montgomery county, Illinois, on county warrants, drawn on the treasurer of said county, by order of the board of supervisors.

These orders were drawn on the treasurer in payment of fees in criminal cases during McLean's term of office as circuit clerk, and were only for such fees as could not be collected from the defendants on their conviction, and where the defendants were acquitted and discharged without the payment of costs. In no case did the amount paid appellant exceed the amount that was due him.

The case was tried by the court without the intervention of a jury. The declaration contained the common counts only. The plea of non-assumpsit was filed, and with it the stipulation that under it appellant might prove any matter of defense which he could offer and prove under any special plea or pleas which could be properly pleaded in the case.

The court below entered judgment against appellant for \$1,507.72, and this appeal was taken.

Messrs. LANE & COOPER and AMOS MILLER, for appellant.

The reports having been duly audited and approved by the county board, all the items charged in them for expense are proper items for which appellant took credit.

These items were within the discretion of the county board to allow. Their action will not be reviewed. *Boyle v. Levi*, 73 Ill. 175; *Thielmann v. Burg*, 73 Ill. 293; *Hull v. Supervisors*, 19 Johns. 260.

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We insist that the determination of the board of supervisors in auditing and approving the reports of appellant and allowing the claims which this suit is brought to recover, is conclusive upon the county. It was paid voluntarily to appellant upon his claim that it was right. There was no mistake as to any fact about the claim. If there was a mistake it was a mistake of law and not of fact; and it is fully settled that proof of a mistake of law will not enable the party to recover back money which has been voluntarily paid under a claim of right. *Supervisors of Chenango v. Birdsall*, 4 Wend. 453; *Supervisors of Onondago v. Briggs*, 2 Denio, 26; *Clarke v. Dutcher*, 9 Cow. 674; *Mowatt v. Wright*, 1 Wend. 355; *Billie v. Lumley*, 2 East, 469; 1 *Story's Equity Jurisprudence*, Sec. 111 *et seq.*, notes; *Broadwell v. Broadwell*, 1 Gilm. 604; *Shafer v. Davis*, 13 Ill. 395; *Campbell v. Carter*, 14 Ill. 291; *Sibert v. McAvoy*, 15 Ill. 109; *Falls v. Cairo*, 58 Ill. 403.

Messrs. J. M. TRUITT and GEORGE PEPPERDINE, for appellee.

Under the rule announced by the Appellate Court in the case of *The County of Crawford v. Lindsay*, 11 Ill. App. 261, and the Supreme Court in the case of *The County of Marion v. Lear*, 108 Ill. 343, there can be no question that this case presents such a state of facts as would have prevented appellant from collecting one dollar of the sum in question from the county had the county board performed its duty and refused to make the payments admitted by appellant to have been made by the county.

Counsel say: "We insist that the determination of the board of supervisors in auditing and approving the reports of appellant and allowing the claims which this suit is brought to recover is conclusive upon the county." That presents in a single sentence the question which is in issue here. They rely upon an estoppel. But whatever may be the rule in other States, the prevailing and better rule, and especially in this State, is that the unlawful act of the board of supervisors can not and does not bind the county. In all matters of judgment and discretion coming within the jurisdiction conferred upon the board by law, the action of the board of supervisors

must be held binding; but whenever the board acts beyond the jurisdiction conferred upon it by law, its action is *ultra vires* and is null and void. See *Cumberland County v. Edwards*, 76 Ill. 544; *Crawford County v. Lindsay*, *supra*; *Jennings v. Fayette County*, 97 Ill. 419; *Manley v. City of Atchison*, 9 Kas. 358; *People, etc., v. Fields*, 58 N. Y. 491; *U. S. v. Bartlett, Davies*, 9; *Stevenson v. Mortimer*, Cowp. 805; *Taylor v. Plumer*, 3 M. & S. 562; *The Board of Supervisors, etc., v. Ellis*, 59 N. Y. 620; *The People, etc., v. The Board of Supervisors*, 67 N. Y. 109.

CONGER, J. On the trial of this case it was agreed and stipulated by the parties that the defendant might, under the general issue, prove any matter of defense which he could offer and prove under any special plea which could be properly pleaded in the cause.

Appellant admitted he was circuit clerk and *ex officio* recorder from the first Monday in December, 1880, to first Monday in December, 1884, and was re-elected his own successor and held the office until first Monday in December, 1888.

It was further admitted by appellant that while he was such clerk he was paid from the county treasury of Montgomery county, Illinois, on county warrants or orders, duly drawn on the treasurer of said county by order of the board of supervisors, in amounts and at dates as follows, which amounts were for fees previously earned and reported by the defendant, as such clerk, in criminal cases where the costs could not be collected from the defendants on their conviction, and in cases in which the defendants were acquitted or otherwise legally discharged without payment of costs, to wit:

1881.	December 8.....	\$151.92
1882.	December 13.....	389.45
1884.	August 5.....	742.80
1885.	April 2.....	371.60
1885.	September 21.....	53.35
1885.	December 18.....	101.10
1886.	December 13.....	145.00
1887.	September 17.....	152.90
1886.	August 17.....	228.30

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It was then agreed by the parties that said sums were paid appellant at the said dates to make up a deficiency in his salary, deputy hire and other necessary expenses of his office which had not been fully paid at the time said sums were paid to him, the deficiency being equal to or greater than the amount then paid; and that at the time each of said payments was made, appellant, as such clerk, had collected, of fees earned by him as such clerk, a greater sum than was necessary to pay his salary up to date of each payment.

It was further admitted that in 1888 appellant was paid from the county treasury, on warrant drawn by order of the board of supervisors, \$100, to pay William Burns to bring up certain records not completed by his predecessor, and that after said Burns had performed said services he was paid for the same by a county order drawn in his favor.

Resolution of board of supervisors fixing salary of appellant at \$1,500 per annum for first term, and a second resolution fixing salary of appellant at same amount for second term; that subjoined to each of said resolutions is a further resolution providing that at the semi-annual settlement with appellant the county board will allow him such reasonable and necessary expenses as they may deem proper and actually paid for deputy hire in his office, other than what he can perform himself, and other necessary expenses contemplated by law, he to render an account of same under oath, supported by vouchers, to be paid out of fees of his office actually collected. Each and every one of the semi-annual reports of appellant, during both terms of his office, was introduced in evidence.

It was agreed that said reports of appellant show that his earnings for his first term of office aggregate the sum of \$15,533.43, and that of said earnings he collected the sum of \$11,171.67. That his earnings for his second term (not including court fees of November term, 1888), aggregate the sum of \$13,397.80, and that of said earnings he collected the sum of \$10,860. It was agreed that said reports show that the expenses of the office during first term for clerk hire, stationery and other miscellaneous expenses aggregate the sum

of \$6,754.65, and for second term, for like expenses, \$6,838.30.

It was further agreed that in the items of miscellaneous expenses set out in said reports, there were items for postage stamps, postal cards, towels, washing towels and soap, the larger amount thereof being for postage stamps and postal cards; for first term amount to \$366, second term, \$378.90.

It was then agreed that the appellant filed his semi-annual reports during said two terms at the times and dates required by law, and that each report was duly examined and approved by the county board of said county, as required by law, and that in the report of the appellant, of December, 1881, there was shown to be due appellant, for preceding half year, \$151.92; and in report of December, 1882, there was shown to be due appellant, on settlement, the sum of \$389.45; and in report of December, 1883, due appellant, on settlement, \$271.30; report of June, 1884, due appellant, as shown in report, \$471.50; in report of December, 1884, due appellant as shown in report, \$526.07; and that in subsequent reports made by appellant, including report of December, 1887, said reports show there was due appellant on settlements with the county board, as follows:

1885. June.....	\$190.87
1885. December	498.14
1886. June.....	589.46
1886. December.....	828.46
1887. June.....	748.96
1887. December.....	604.46

Appellant testified in his own behalf, as follows: "I paid my deputies weekly, during both terms, out of the fees of the office that had been collected; when I did not collect enough fees to pay my deputies, I paid them out of my own money. The miscellaneous expenses were paid from time to time, just as the expenses were made. Whatever deficiency there was of fees collected to pay deputy hire and other necessary expenses and my salary, was always on my salary. All of the items of expense were necessary in running the office. I took receipts of my deputies for the money I paid them.

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The deputies I had in the office were necessary to keep up the work of the office. The amounts I paid them, as shown in my reports, were reasonable for the services they rendered in the office.

The items charged for miscellaneous expenses are made up of express charges, stationery, telegrams by order of court, postage stamps, towels, soap, washstand, and the sprinkling of street at the south front of the office. All these items were necessary expenses of the office. The washstand was bought after consulting with the member of the public buildings committee of the board of supervisors, who agreed I should buy it for use in the office. The washstand, soap and towels were used in the office after handling the books, which were usually covered with more or less dust and dirt, making it necessary to wash before writing on white paper, otherwise the books and papers would have been soiled. The sprinkling was paid for after consulting the same committee who agreed that it was a proper expense; in the summer season the prevailing winds are from the south, and blow and sweep dust up Main street into the office windows which front south on Main street, covering the books, papers and office furniture with dust. The sprinkling prevented much of the dust from blowing in on the books and office furniture.

The postage stamps were used in answering correspondence in connection with the business of the office; a great many letters of inquiry by witnesses, suitors, lawyers and others came to the office requiring answers and were answered, and a great many deeds and other instruments were filed with the request when recorded to be returned by mail to the parties filing the same for record; this, of course, required a great many postage stamps and cards, which were bought by me or some one of my deputies, as needed, and charged up and paid for as expense of the office. Occasionally I might have used a stamp on my private correspondence; I, however, had but very little private correspondence, only an occasional letter to a friend. I had no private business while I was clerk that required any correspondence;" which was all the evidence offered by either party.

From an examination of the facts which were agreed to, and which fully appear in the statement, it will appear that there are two questions of law arising upon this record.

First. Where a clerk has actually collected as fees of his office a sum equal to or greater than his salary, but has out of such sum paid deputy hire and other necessary expenses of his office so that the amount unexpended is not sufficient to pay his salary, can the county board legally allow him fees in criminal cases sufficient to make up the balance of his salary under Sec. 15 of Chap. 53, which is as follows:

"In all criminal cases, when the costs can not be collected from the defendants, on their conviction, or when the defendants shall be acquitted, such costs shall be paid from the county treasury; provided, that no such fees shall be paid to said clerk from the county treasury when the fees collected by him during such years shall equal the compensation or salary allowed him by the board of supervisors; and provided further, that no more of such fees shall, in any case, be paid from the county treasury than shall be sufficient, with the fees collected, to make the compensation or salary of said clerk."

We are clearly of opinion that under this section the county board has no legal right to make such an allowance. If the amount of fees actually collected equal or exceed the salary the board would be powerless to make the allowance contended for.

As said in *Marion Co. v. Lear*, 108 Ill. 351, "He, (appellant) must show a deficiency in the payment of his 'salary,' *i. e.*, personal compensation—after applying to the payment thereof all the fees collected by him from other sources, before he can require the county to pay these fees in criminal cases, and then it can only be required to do so to the extent of such deficiency." *Crawford Co. v. Lindsay*, 11 Ill. App. 261.

It may be, as contended by appellant, that where the fees actually collected are in part used to pay the necessary and proper expenses of the office, thus leaving the salary unpaid in part, it would be but just that such deficiency should in some

C., B. & Q. R. R. Co. v. Peterson.

way be made up by the county, but in view of the plain and unequivocal language of the 15th section, and the construction given it by the Supreme Court, it can not be done as contended for by appellant.

Second. Where a county board has audited and allowed the payments made by a clerk for deputy hire and other expenses of the office, thereby reducing the sum actually collected by the clerk, as fees, below the amount necessary to pay his salary, and afterward in violation of the provisions of Sec. 15 allow him fees, in criminal cases, sufficient to make up his salary, is the county estopped from recovering from such clerk such illegal allowance?

We think not. When a county board attempts to make an allowance not authorized by law, it is acting without jurisdiction, entirely beyond its power, and its acts are utterly void and do not bind the county. The board is the agent of the county, and when allowing a claim against it over which it has jurisdiction, and the amount to be paid is discretionary, the conclusion reached would no doubt be binding upon the county; but when the board seeks to appropriate funds in the treasury in direct contravention of the statute it exceeds its powers, and in no sense does it estop the county from ignoring and repudiating such action. *Cumberland Co. v. Edwards*, 76 Ill. 544; *Jennings v. Fayette Co.*, 97 Ill. 419. The holding of the Circuit Court being in harmony with these views, we think the judgment was right and it will therefore be affirmed.

Judgment affirmed.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY

v.

S. S. PETERSON.

32	136
78	438

Master and Servant—Railroads—Personal Injuries—Wild Trains—Section Hand—Contributory Negligence—Rules—New Trial.

In an action by a section hand against the railroad company employing

him, to recover for injuries alleged to have been caused through the negligent management of one of its trains, this court holds that the judgment of the trial court in behalf of the plaintiff is unsupported by the evidence.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of McDonough County; the Hon. WILLIAM MARSH, Judge, presiding.

Messrs. O. F. PRIOR, TUNNICLIFF & TUNNICLIFF, and SWEENEY & WALKER, for appellant.

Messrs. D. CHAMBERS and PRENTISS & BAILY, for appellee.

WALL, J. In this case the plaintiff alleged that he was employed by the defendant as a section hand, and while engaged in the ordinary discharge of his duty, working with a handcar on defendant's railroad, and while using due care and diligence, a locomotive engine, in charge of other servants of defendant, was so negligently and carelessly managed and handled that it was driven against the handcar and plaintiff was thereby injured. The plaintiff recovered and the record is brought here by the appeal of defendant.

The plaintiff at the time of the collision was with the other men of his gang on the handcar going home. It was between five and six o'clock in the afternoon. An extra or wild freight train was moving along the track in the opposite direction. Those in charge of the train did not know that the handcar was to be expected at the point in question, or elsewhere, nor did those on the handcar know that the train was to be expected. By reason of the peculiar conformation of the road the two parties were not more than one-fourth of a mile apart when the engineer saw the handcar. He had previously given the usual signal for the highway crossing, which he was then passing over, and he immediately gave the stock alarm and reversed his engine. The brakes were all set promptly, the whistle was sounded repeatedly, and the bell, operated by steam, was ringing continually. In short, every reasonable effort was made to stop the train, but without succeeding in time to prevent the collision.

It would appear that the men on the handcar did not act as promptly as they might if they had seen the train as soon as the engineer saw them, but they finally stopped the car and got it partly off the track, when, finding they could not save it, the foreman ordered the men to get out of the way. The plaintiff instead of stepping squarely to one side moved in an "angling" course to the right of the track and in front of the engine and was struck by a fragment of the handcar, receiving the injury complained of.

Under all the circumstances in proof it would be difficult to fix any such want of care on the plaintiff as to bar his recovery if the charge of negligence on the part of the train men can be sustained by the evidence. Had he stepped either to the right or left, or had he moved to the rear or either side, he probably would have escaped, and it is now quite plain the course he took was the most dangerous possible; but, under the excitement and in the confusion of the moment, it is not certain that any man of ordinary prudence would have done otherwise, and he is not to be charged with negligence because he had not time to reflect and determine which direction would be safest. There is more ground for saying that the foreman of the gang was negligent in not more promptly making the effort to stop the handcar; but in view of all the facts in evidence, we are not inclined to say there was negligence in this respect. Assuming then that those on the handcar were ordinarily careful when the circumstances are all considered, the vital question is whether the charge of negligence in the management of the train is sufficiently sustained by the evidence.

The trainmen had no reason to expect the handcar. It was a well known rule that section men were required to be on the lookout at all times for trains regular and extra; that they were not to be notified of the position of trains of either sort; hence the train men were not at fault in not knowing the handcar was on the track or in not running as though it might be expected. If, after it was discovered, all reasonable effort was made to prevent the collision, then there was no negligence on their part.

From what has been stated they did all that was reasonably required to this end. There is no contradiction of their testimony in this respect, indeed it is rather sustained by the evidence of Hewes, the witness of plaintiff, who was driving along the highway and saw the whole occurrence. It is true that by some rather strained and forced arguments counsel urge us to the conclusion that the evidence of the train men is unworthy of belief, and that by the exercise of reasonable care and diligence on their part the collision might have been avoided. We shall not go into any analysis of these arguments or of the facts upon which they rest. It is enough to say that we find them wholly unsatisfactory. In our view of the facts, fairly to be deduced from all the evidence, there was a clear failure to establish the charge of negligence as alleged in the declaration. It was error to refuse the motion for new trial.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

ROBERT McDONALD

v.

LEMUEL MOORE ET AL.

Master and Servant—Independent Contractor—Balance Due.

In an action brought to recover a balance alleged to be due on a building contract, the errors being unimportant and immaterial, and substantial justice having been done, this court declines to interfere with verdict for plaintiffs.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Vermillion County; the Hon. E. P. VAIL, Judge, presiding.

Mr. R. D. McDONALD, *pro se*.

McDonald v. Moore.

Messrs. F. BOOKWALTER and J. B. MANN, for appellees.

WALL, J. This was assumpsit to recover a balance alleged to be due for labor and materials in the building of a house.

The contract price was \$4,100 upon which \$3,500 had been paid. Certain extras had also been paid for. The defense was that the work had not been done and materials furnished according to the specifications and for default in this respect the jury made an allowance of \$100.

The verdict was for \$500 upon which judgment was rendered and the case comes here upon defendant's appeal.

There was considerable conflict in the evidence and as is not unusual there was a wide range in the estimates of the various witnesses as to the damages caused by the supposed imperfections in work and materials. Appellant was frequently present while the building was in progress and made some objections. Some of the matters thus objected to were corrected. Some of them, as the evidence tends to show, were waived and some of them appellant was not willing to have amended by the servants of the appellees.

Before the house was completed appellant occupied it and while not entirely satisfied with the job he appropriated it to his own use.

After a careful reading of the evidence we are impressed with the belief that the jury reached a very fair conclusion and that their verdict is substantially just to both parties.

The alleged errors in the admission of evidence are unimportant, and while the instructions may be subject to some criticism we are of opinion the appellant was not prejudiced by the matters complained of therein.

No useful purpose would be subserved by another trial and the judgment will be affirmed.

Judgment affirmed.

PETER DOLAN
v.
JOHN FARRELL.

Mortgages—Foreclosure—Payment—Witnesses—Credibility.

Upon a bill to foreclose a mortgage, it being contended that the note it was given to secure had been paid, the evidence being sharply conflicting and the credibility of the witnesses of prime importance in the consideration of the case, this court declines to interfere with decree for plaintiff.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Jersey County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Mr. A. W. HOPE, for appellant.

Mr. D. D. GOODELL, for appellee.

PLEASANTS, P. J. This was a bill to foreclose a mortgage executed by appellant to Martin B. Miner to secure a note for purchase money, dated August 27, 1869, for \$125, at one year with interest, and assigned to appellee. The defense set up was payment in cash, specific articles and work by appellant's wife for appellee agreed to be credited on said note. On replication filed there was a reference to the master, who, on the proofs taken and reported, found the amount remaining due and unpaid to be \$153, on which a decree was entered for complainant in the usual form. A motion made to vacate it, as taken in violation of an alleged stipulation between the solicitors, we think was not supported by sufficient proof of that allegation, and therefore properly overruled.

It appears that neither of the parties could read or write. The note bore indorsements of several credits on account. As to others claimed there was evidence to support them and other evidence in denial and explanation thereof. There was

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also some tending to show offsets, a settlement and balance found, and some to impeach the general reputation of defendant and his wife for veracity. The case turned wholly upon the credibility of the evidence, of which the master and the chancellor were probably better able to judge correctly than are we.

Having no means of knowing what was credited or discredited, nor any special reason for supposing there was a misjudgment of any of it, we would have affirmed the decree as it stands; but since the cause was submitted, appellee has seen fit to enter a *remittitur* of \$30, expressed to be in view of some possible error as to the amount found due but not admitting any in fact, and it will therefore be affirmed as for only \$123, so found.

Decree affirmed.

JOHN L. GOFF, SHERIFF, ETC.,

V.

DOUGLAS COUNTY.

Sheriff's—Compensation for Keeping Jail—Assistant.

Under the laws of this State it is a part of the official duty of the sheriff to keep the county jail. He is entitled to no compensation therefor in addition to his salary, except as it may be provided by the county board, and he can not maintain an action against the county for money paid by him to an assistant jailer.

[Opinion filed November 23, 1889.]

IN ERROR to the Circuit Court of Douglas County; the
Hon. C. B. SMITH, Judge, presiding.

Messrs. ECKHART & MOORE, for plaintiff in error.

Messrs. JOHN R. EDEN and J. K. BREEDEN, for defendant
in error.

CONGER, J. The plaintiff in error is the present sheriff of Douglas county, having been elected in November, 1886.

Immediately after his election he appointed J. C. Cutler assistant jailer of said county, at a certain sum *per diem*. The amount was audited and paid by the county until the meeting of the board in May, 1888. At the March meeting, 1889, of the board of supervisors of the county, there was due plaintiff in error the sum of \$348, being the aggregate of sums of money paid out to J. C. Cutler by said sheriff for his services as assistant jailer. This amount was for sums paid out covering different periods of time from May 5, 1888, to December 3, 1888, and from December 3, 1888, to March 4, 1889. Accounts for these various sums of money were presented to the board of supervisors of the county duly verified, as required by law. The board of supervisors refused to allow the claim.

At the April term, 1889, of the Circuit Court, plaintiff in error brought a suit against the county to recover the sums he had paid out to the assistant jailer. The suit was brought in *assumpsit*. The declaration contained the common counts only, with which there was filed a bill of particulars.

Defendant in error, by its counsel, filed a demurrer, which was overruled, and plaintiff in error then, by leave of court, filed a special count, and defendant in error again filed a demurrer, which was sustained, to the special count, and a *nolle* was entered as to the common counts. The plaintiff in this suit, abiding by his declaration, brings this case to this court, and assigns for error the ruling of the court below in sustaining the demurrer to the special count of plaintiff's declaration.

The special count is as follows:

"Now comes said John L. Goff, sheriff of said county, plaintiff in the above cause, by Eckhart & Moore, his attorneys, and complains of the county of Douglas, a body politic and corporate, defendant in said cause, summoned of a plea of trespass on the case on promises; for that whereas, heretofore, to wit, said plaintiff at various times from May 5, 1888, and to December 3, 1888, inclusive, at said county, said plaintiff

paid to J. C. Cutler the sum of \$212; and also at various times, from December 3, 1888, to March 4, 1889, inclusive, at said county, said plaintiff paid said J. C. Cutler the sum of \$136.50, said sums having been paid as aforesaid to said Cutler for services rendered as assistant jailer of said county, for keeping said jail from May 5, 1888, to December 3, 1888, and from December 3, 1888, to March 4, 1889. Plaintiff avers that said services were necessary, and that said plaintiff presented said claim, to wit, the total sum of \$348.50, being the aggregate of said sums, to the board of supervisors of said county, as an account against said county, at their meeting held in March, 1889; and also said plaintiff, at the meeting of said board held in December, 1888, presented said claim, to wit, \$212, as an account and claim against said county, and that said board of supervisors, at said meetings, respectively, and at other meetings of said board, refused to allow said claim, and then and there denied the same, to the damage of said plaintiff for said sum of \$348.59, whereby an action has accrued to plaintiff against said defendant, at the county aforesaid, for said sum of \$348.50, paid out as aforesaid, and therefore he brings suit for said amount, \$348.50."

The facts by the demurrer are admitted, and the only question is whether the county is liable at all for money paid out for keeping the jail, under the facts as presented by this special count, and admitted by the demurrer to be true.

The act relative to jail and jailers was passed in 1874, and this subject is treated in chapter 75 of the Revised Statutes. By Sec. 2 the sheriff is keeper of the jail, and by Sec. 3 he may appoint an assistant jailer and remove him at pleasure. By Sec. 24 "the cost and expense of keeping, maintaining and furnishing the jail of each county, and of keeping and maintaining the prisoners thereof, except as otherwise provided by law, shall be paid from the county treasury, the account therefor being first settled by the county board."

By the law, the keeping of the jail is made a part of the official duty of the sheriff, as much so as serving criminal and civil process, preserving the peace and the other varied and

important duties of his office. It is true he may perform any of his duties by a deputy—but he is not entitled to be reimbursed, out of the county treasury, for money paid to him for such services, except as provided by law. It is usual for the county board, in fixing the salary and compensation of the sheriff, to make an allowance for deputy hire, but should they refuse to do so it is clear, we think, that the sheriff could recover nothing for amounts paid to his deputies.

It is urged by plaintiff in error that, while the sheriff has the legal custody and control of his jail, he could not give it his personal attention, without neglecting his other duties.

In some counties this would be true, while in others it would not be. In many of the counties of the State the sheriff is not only theoretically, but actually the keeper of the jail.

The law intends to give the county board the entire and absolute control of determining the amount of the compensation or salary to be paid the sheriff for his personal services, and also the amount he may be authorized to expend on account of the county for procuring assistance in executing the entire round of his official duties.

Because county boards may, and sometimes do fail to make a sufficient allowance for these purposes, it in no way detracts from their power over the whole subject, or authorizes an action to compel greater liberality in their dealings with county officers. It must be understood we are now speaking only of the work and labor required to perform the duties connected with the sheriff's office, which, as we think, includes the custody and care of the jail and the prisoners confined in it.

By Sec. 19 the keeper of the jail is required to furnish bedding, clothing, fuel and medical aid for prisoners, and keep an accurate account of the same, and Secs. 20 and 21 provide for whitewashing and cleaning the jail and providing such conveniences for the prisoners as their health requires; and by Sec. 19 of Chap. 53, the sheriff is allowed, for dieting each prisoner in jail, such compensation to cover the

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actual costs as may be fixed by the county board, but such compensation shall not be considered a part of the fees of his office.

These items of expense and all others, when the written law or humanity make it the duty of the sheriff to expend money to keep his prisoners safely and with proper regard to their comfort and health, are those intended to be included in the language of Sec. 24, of Chap. 75, and for which the county is liable. But for the duty of keeping the jail, whether by the sheriff in person or by deputy, the county makes legal compensation by the salary and deputy hire allowed, and in cases where such compensation is not adequate for the services performed, the county board can alone afford relief.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

CHRISTIAN OBROCK

V.

LOUISA OBROCK.

Husband and Wife—Separate Maintenance—Justifiable Abandonment—Evidence—Allowance—Costs.

88	149
79	617
33	149
180s	508
82	149
107	668

Upon a petition under the statute by a wife for separate maintenance, this court declines to interfere with decree for complainant.

82	149
118	88

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Mr. J. C. THOMPSON, for appellant.

Messrs. BERRY & EPLER, for appellee.

WALL, J. This was a petition for a separate maintenance under the statute.

The cause was heard by the court upon oral evidence and the issues were found for the complainant. The case is brought here by appeal, and errors are assigned upon the finding and the decree.

The appellant urges that the evidence does not support the allegation that complainant was, without her fault, living apart from her husband.

The parties had been previously married and each had children by the former marriage. Appellant had seven children, the two oldest being daughters, aged twenty-five and twenty-two years, respectively. These daughters had kept his house since the death of their mother, and were averse to the introduction of a step-mother. From the beginning to the end there was trouble, mostly induced through the children. There is reason to believe that but for the children appellant and appellee might have lived together with comparative peace and satisfaction. Nor was the fault wholly with the children of appellant, though it was mainly so. In these controversies the husband took the part of his own children, and the result was that the appellee was not permitted to occupy the position in the household which, as a wife, she was entitled to. She states that there was a persistent purpose to drive her from the house, to which appellant finally became committed, and on three separate occasions he told her to go.

She was charged by appellant and his children with filthy habits and unfitness to keep the house in a proper condition, and the result of it all was that she could not abide there with peace or self-respect. The conduct of appellant and his children was such as to render her position miserable in the extreme, if not absolutely intolerable, and she was abundantly justified in quitting the appellant. Such is the fair conclusion to be drawn if her version of the case is correct. There is much conflict and contradiction in the evidence, but this is more as to the extent and character of the difficulties than as to their origin, and there can be no doubt that the situation was an unhappy one for her and for all concerned.

The court, hearing this oral evidence, and having the par-

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ties and witnesses present, found the wife was living apart from her husband without her fault, and we are inclined to hold that if the wife's evidence is to be credited, there was sufficient to justify the conclusion.

As to the weight to be given to the finding of the chancellor, and the grounds which will warrant a wife in withdrawing from her husband's home, reference may be had to *Johnson v. Johnson*, 125 Ill. 510. It is also urged that the court erred in fixing the allowance at the sum of \$150 for the period from September 4, 1887, to January 1, 1889, and at the rate of \$15 per month from the latter date, and in allowing \$100 for a solicitor's fee as a part of the cost of the suit.

Upon consideration of the evidence we think there is no occasion for our interference in this respect. The decree will be affirmed.

Decree affirmed.

GEORGE MENTZER
v.
JOHN L. ROBINSON.

Partnership—Dissolution—Settlement—Construction of—Deceit.

Upon the dissolution of a partnership between appellant and appellee, and the settlement of the partnership affairs, an agreement was signed, which provided that appellant should pay appellee \$2,154.30 for his entire interest in the business and property of the firm, including all interest in the book accounts due said firm, and pay all unpaid debts or claims against it. There was present a book of accounts showing \$1,975 due the firm, which appellee, who had been the book-keeper, said "was in the neighborhood of correct." Appellant afterward learned that a considerable amount of these accounts had been paid to appellee. Upon action brought by appellee to recover the unpaid balance of the amount provided by the above agreement, in which the defense was partial failure of consideration, it is *held*: That appellant had purchased, not an interest in a definite amount of accounts, but appellee's interest, whatever it was; and that the question whether appellee was guilty of deceit, was one of fact, and the judgment of the trial court would not be disturbed on that point.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Piatt County; the Hon. E. P. VAIL, Judge, presiding.

Messrs. S. R. REED and H. H. CREA, for appellant.

Under Sec. 9 of Chap. 98, Negotiable Instruments, Starr & Curtis' Stat., page 1661, either total or partial failure of consideration may be pleaded in defense of an action on an instrument in writing, and parol testimony may be introduced in support of such plea. This section has governed in many adjudicated cases in this State. Great Western Insurance Company v. Rees, 29 Ill. 272; Gage v. Lewis, 68 Ill. 604; Oertel v. Schroeder, 48 Ill. 133.

A partner not well acquainted with the affairs of the firm purchased a portion of the partnership interest of the other partner, and gave his note, relying on the representations of the partner as to its value, which he subsequently ascertained to be fraudulent; the interest so purchased was worthless; the firm being insolvent these facts constituted a good defense to the note. Smith v. Smith, 30 Vt. 139.

One partner may sue his co-partner in assumpsit after dissolution, to recover back money paid by mistake on an adjustment of the partnership concerns. Bond v. Hays, 12 Mass. 34; Beidler v. Shellenberger, 42 Iowa, 203.

Messrs. LODGE & HICKS, for appellee.

PLEASANTS, P. J. From July, 1885, to May, 1888, the parties to this suit were equal partners in the business of making and selling tile and brick at Cerro Gordo. While appellant attended mainly to the manufacture, appellee made sales and undertook to keep the books. Having no knowledge of the art according to any system, his method of keeping them, if it might be so called, was very imperfect, and dissatisfaction having arisen between them, they proceeded to arrange terms of settlement and dissolution. Without difficulty they agreed upon the disposition of all the partnership matters except its outstanding credits. As to these appellant was unable to satisfy himself from the books. He could not

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undertake, with intelligence and confidence, to settle with anybody by them. A clerk was therefore employed to gather, sift, arrange and transcribe into a new book the scattered and tangled entries in the old. After a month's labor, with frequent explanations, or attempts at explanation by appellee, he completed the transcript as well as he could, and notified the parties. They met on May 7, 1888, appellant being attended by counsel, to learn the result and dispose of the accounts. The aggregate of the balances and accounts due the firm, as shown by the transcript, was a little less than \$2,000. Appellant knew nothing about them. Appellee said they were in the main correct, but there were probably errors—he couldn't be positive in regard to them, "they were in the neighborhood of correct." His idea of them is shown by the clerk, who states that they looked through the book and read quite a number of the accounts, and that as he went over them "Mr. Robinson would say 'that is about correct,' and then he would say 'I do not think he owes that much,' and on one or two occasions 'I think the man owes more than the book shows;'" and we conversed in that way through the different accounts." After all this talk it was proposed that one set a price on them at which the other would either buy or sell, but appellant objected, and suggested instead that they be put up at auction, proposing to make the first bid. That being acceded to he bid \$500, and, no more being offered, took them. His counsel thereupon wrote the agreement by which the partnership was dissolved and all its affairs settled as between the partners. It provided, among other things not necessary to be here noticed, that appellant should pay to appellee on or before the 27th of that month \$2,154.30 "for his entire interest" in the business and property of the firm, "including all interest in the book accounts due said firm," and "pay all unpaid debts or claims against it." The \$500 bid for the accounts was included in the amount above stated. In proceeding to collect the accounts and balances appearing by the transcript to be due, appellant learned that a considerable number of them had been settled and satisfied before the dissolution agreement was made, and therefore when called on for pay-

ment according to that agreement he refused, unless appellee would make them good to him.

Thereupon this suit was brought against him in *assumpsit*. He pleaded the general issue, and it was stipulated that he might introduce any matter of defense, and the plaintiff any in reply that would be admissible under any proper plea or replication. The cause was tried by the court without a jury, at the February term, 1889, and judgment rendered for the plaintiff for \$1,017.95, being the full amount due by the terms of the agreement with interest, after crediting \$1,200 paid in September.

It appears from the record and argument that the defense relied on was partial failure of consideration. Appellant insists that what he contracted to pay for was an aggregate of dues on book account amounting to \$1,975, and what he received was considerably less, and that the entire amount of the deficiency should be deducted from the price agreed to be paid. But the agreement itself, which was in writing, and all the other evidence on the subject, shows that he contracted for only a half interest in the dues referred to; and therefore, in any view of the defense—whether as partial failure of consideration, or by way of set-off or recoupment for breach of warranty, or for deceit as to the aggregate amount—he would be entitled to a deduction of no more than one-half of the deficiency shown. For that reason alone the court might well have refused to hold the propositions of law set out in the abstract; for as to the half interest he already owned as partner, and therefore could not then buy, no warranty or deceit in relation to its amount or value could have been a legal injury or cause of damage, or a foundation for any legal claim by way of defense in this suit, since it could not have affected the actual amount or value of that interest, nor induced the purchase of the other. And if he did not contract for any certain amount of firm dues, but only for the interests of appellee therein, whatever they might be, and received all of that interest in all there were, then there was no failure of consideration. The instructions referred to might have been refused in that view of the case. We think

the evidence fairly sustains that view of it. The agreement states no amount, directly or indirectly, definitely or approximately. Appellee at the time stated no certain amount, nor any within certain limits. It is true a book was present which was contemplated as the book of the accounts intended, and that it showed a certain amount, and a certain amount was then and there stated as being so shown. But as was well known to both the parties, that book purported to be only a transcript of entries from the original books of the firm, sifted and re-arranged. No time was taken by them to ascertain how just and accurate it was. Appellee stated—what appellant also otherwise knew—that he had not kept the original in any systematic order, and all else that he said about them plainly showed his unwillingness to represent them as full and accurate, or to say with any definiteness how nearly accurate he believed them to be. Appellant bought the accounts actually due, relying doubtless upon the book as far as he might with his knowledge of the keeper and his methods and statements; but he certainly did not contract for any certain amount or any within stated limits, and it would hardly be contended that if they had been found to exceed that appearing by the transcript he would have accounted or been bound to account to appellee for half the excess.

Then the only real cause of complaint, if any, he had against appellee in the matter, was deceit, fraudulent misrepresentation or suppression of facts known to him in relation to the amount of actual dues. This was a pure question of fact. The charge rests mainly upon the magnitude of the difference between the aggregate amount actually due and that appearing so by the transcript, and certain statements said to have been made by appellee, after the dissolution, of the amount he supposed to be due, which was not far from the real amount. But he testified that he stated the same opinion to appellant before the dissolution, though this was denied, and to circumstances explaining, in part at least, how there came to be this difference, some having a general bearing and others relating only to particular accounts. The appearance

on the books of quite a number of those said to have been settled or otherwise charged in error was accounted for by the parties charged, who were called to testify for the appellant. It would be useless, however, to consider these circumstances and explanations more particularly. They tended to rebut the evidence of fraudulent misrepresentation or concealment of facts by appellee, and were for the court below to consider and weigh. Upon the evidence as it appears in the record, we think the charge is not sustained, and if we were in greater doubt, would defer to the conclusion of the judge who had the advantage of seeing and hearing the witnesses.

Judgment affirmed.

MARY E. BUTZ, ADMINISTRATRIX,

v.

JACOB SCHWARTZ.

Negotiable Instruments—Promissory Note—Action by Administratrix of Indorsee—Fraud and Circumvention in Procuring Signature—Evidence—Instructions.

1. In an action on a promissory note by the administratrix of the indorsee, he having died after suit brought, where the defense relied on was fraud and circumvention on the part of agents of the payee in procuring the signature to the note, the maker of the note was a competent witness under Sec. 2, Chap 51, R. S., 3d exception, as to conversations or transactions with him testified to by said agents at plaintiff's instance, said agents having a direct interest in the result of the suit.

2. If payee's agents did not have a direct interest in the result of the suit, then defendant was a competent witness as to conversations or admissions by him testified to by these agents at plaintiff's instance, under the 4th exception. Under this exception all that was said and done on the occasion testified to, the *res gestæ*, was admissible.

3. In an instruction to the jury, the omission of the qualification that false testimony must be with regard to a material matter in issue in order to justify the jury in disregarding the whole testimony of a witness whose testimony is false in part, does not constitute reversible error, where it is apparent that all the supposed false testimony to which the instruction referred was upon material points. Minor exceptions to instructions overruled.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Messrs. WILLIAM McFADON and EMMONS & WELLS, for appellant.

Messrs. CARTER, GOVRET & PAPP, for appellee.

WALL, J. For a statement of the controversy involved in this case, reference may be had to 15 Ill. App. 114. After the case was remanded, the original plaintiff died and the present appellant having been appointed administratrix of his personal estate became plaintiff in his stead. Three trials have since occurred, in one of which the jury were unable to agree, and in the other two verdicts were for the defendant. From the judgment on the last verdict the present appeal is prosecuted.

In the printed argument counsel for appellant say that the principal complaint they have to make is that the court erred in allowing the defendant to testify on his own motion and in his own behalf to conversations had by him with the agents of the payees of the note at the time it was executed, and to the action of the court in giving instructions for the defendant.

The defendant was of course incompetent to so testify as to any matters occurring before the death of the plaintiff's intestate, unless within one or more of the exceptions to Sec. 2, Ch. 51, R. S., relating to evidence. It appears that the persons with whom the conversations occurred, David W. Jennings and Marion Hughes, the agents of the payees of the note, were present at the time of its alleged execution, and had more or less to do with the transaction out of which this suit arose.

By the pleadings two questions of fact become prominent and controlling: 1st, did defendant sign the note. 2d, if so, was his signature procured by fraud and circumvention.

These witnesses, Jennings and Hughes, testified that they

were present and saw defendant sign the note, that it was read over to him by F. C. Jennings, and that it was given in completion of the contract; that the consideration of the note was a quantity of lightning rods which defendant purchased, and that a credit of \$8.02, which appears on the back of the note, was on account of a board bill of the defendant against these witnesses and F. C. Jennings, who was also an agent of the payees of the note. A part of this evidence was read in rebuttal, but it was all contained in the depositions of these witnesses taken on behalf of the plaintiff.

If the note was obtained by fraud and circumvention, it seems quite clear these agents would be responsible to their principals for any loss or damage caused them by such an illegal transaction, and that they had a direct pecuniary interest in supporting the note, to avoid such responsibility, as well as to insist upon the payment of their bill to the defendant by means of the credit indorsed on the note. If they had a direct interest in the event of the suit, then defendant was competent to testify, under the third exception, to the conversations or transactions testified to by them. We think he was competent under that exception. Again, by the fourth exception it is provided that where any witness not a party to the record or not a party in interest or not an agent shall testify, at the instance of any party to the action, to any conversation or admission of any adverse party, occurring before the death of and in the absence of any such deceased person, such adverse party may testify as to the same admission or conversation.

If it could be held that the witnesses Jennings and Hughes were not interested in the result of the suit, then defendant was competent to testify to any admission or conversation testified to by them. It is urged, however, by appellant, that defendant under this exception was limited strictly to the *conversation* or *admissions* testified to by those witnesses, and that except as far as their evidence was read in rebuttal, they testified to a *transaction* merely, to wit, the mere signing of the note after the same was read over to defendant, and that in so doing they were not testifying to a *conversation* or *admission* as to which *only* could defendant testify.

Butz v. Schwartz.

The object of the second section of the act referred to, was to so limit the operation of the first section as to place parties upon an equal footing and not to allow the estate of a deceased person or of a person under the disabilities mentioned to be subjected to a disadvantage not possible if it were not for such death or disability, and the courts have always endeavored to construe the statute according to its spirit and not merely according to its letter. *Whitmer v. Rucker*, 71 Ill. 410.

It is the settled rule that where a conversation is testified to, the whole of it may be brought out, and very often this will involve what was done in the same transaction of which the conversation was part and parcel. In this instance it would be difficult to separate the matters testified to in the part of the deposition which was read in chief, from those testified to in the part of the same deposition read in rebuttal, and it would be quite as difficult to separate the mere language used by the parties from what they were then doing on that occasion. Hughes and Jennings say the note was read over to the defendant and he then signed it. He says it was not so read to him, but was represented to be for the purpose of inducing and procuring the payees of the note to constitute his son Daniel an agent to sell the rods, which were then left there, upon certain terms which he states, as to the commissions, etc. The version of the conversation given by defendant naturally involves all that was said by both sides as well as what they did at the time, and so of the version given by Hughes and Jennings. Any fair construction of the exception in question must necessarily admit the entire conversation, and as necessarily, whatever was done on the occasion—the whole *res gestæ*. Therefore it follows that whether Hughes and Jennings were or were not directly interested in the event of the suit, the defendant was competent as to the same matters to which they testified and there was no error in this ruling of the court.

It is urged the court erred in admitting the "yellow papers" offered by defendant. They were blank orders or contracts, to be used when contracts were made to erect rods on buildings, and were left with defendant by the agents of

the payees as a part of the transaction. There was no error in this respect. The appellant urges also that it was error to refuse the 14th and 15th instructions asked by appellant. All that was competent or proper in the 14th was contained in others given.

The 15th was wholly unnecessary and there was no error in refusing it.

As to the instructions given for appellee it is urged that the 11th, 14th and 15th are bad because they omit the qualification that the false testimony must be with regard to a material matter in issue, in order to justify the jury in disregarding the whole evidence of a witness whose testimony is false in part. On examining the evidence, however, it is not perceived how this omission in these three instructions could have prejudiced the appellant, for it is apparent that all the supposed false testimony to which the instructions would be understood to refer, was upon material points. When this is so the error will not vitiate even in capital cases where life is at stake. *Dacey v. The People*, 116 Ill. 555. But a careful reading of the instructions will disclose that they are really not faulty in the respect urged, and when fairly considered they authorize the rejection of the testimony of a witness only to the extent it is found to be mistaken or untrue. As to the 15th, there is some ambiguity in the latter clause, and possibly it might be interpreted by a jury as counsel suggest, were it not for the 16th immediately following, in which the rule permitting the rejection of the entire testimony of a witness because false in part is fully and correctly given. The instructions when considered as a series are substantially good.

No other objections are pressed in the brief of appellant. The judgment will be affirmed.

Judgment affirmed.

THE OHIO & MISSISSIPPI RAILWAY COMPANY

v.

WILLIAM H. BURROW.

Railroads—Ejection of Passenger for Non-Payment of Fare—Damages.

Where a passenger is ejected from a railway car for non-payment of fare at a place other than a station, he can not recover, as part of his damages, for injuries received from unnecessarily walking to his home, several miles distant, he being in poor health, when the station at which he boarded the train was within five or ten minutes walk of the point of ejection.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Shelby County; the
HON. JACOB FOUKE, Judge, presiding.

Messrs. POLLARD & WERNER, for appellant.

The court gave the following erroneous instruction to the jury, to which defendant excepted:

"If the jury believe from the evidence that defendant was forced off the train of defendant at a place other than a regular station, and received injury therefrom, and this was done by servants of defendant, that then the defendant is liable for any damage sustained by the plaintiff, even though he may not have paid his fare."

This instruction was too broad, and authorized the jury to allow the plaintiff damages for walking home after the ejection, and any illness that was brought on by that indiscretion. C., B. & Q. v. Parks, 18 Ill. 460; C. & A. R. Co. v. Roberts, 40 Ill. 503; C., B. & Q. R. R. Co. v. Wilson, 23 Ill. App. 63.

Mr. H. J. HAMLIN, for appellee.

The liability is conceded, as is now admitted by the argument of appellant in this cause filed, although the principal question in the court below was as to the right to put a passenger off at a point within the "switch limits," or within the limits of the town. This question has been recently

settled, both by this court and the Supreme Court. Illinois Central Railroad v. Latimer, decided by the Supreme Court April 5, 1889.

They were exactly like those approved in Kidd v. L. St. L. & K. C. R. R. Co., decided recently by this court. There was no error in showing plaintiff's condition at the time of his ejection or as to the route he took in going home, nor was there any error as to the question of nominal damages. These questions have all been settled against the appellant. Chicago & Alton R. R. Co. v. Flagg, 43 Ill. 367; C. & N. Railway Co. v. Chisholm, Jr., 79 Ill. 584.

CONGER, J. This was an action brought by appellee against appellant for the recovery of damages occasioned by the servants of appellant ejecting appellee from appellant's car at a place other than a station for non-payment of fare.

The facts as shown by the record, are, that about 2 o'clock in the afternoon of February 2, 1888, appellee went upon a regular passenger train at Holiday to go to the next station, Cowden, a distance of three miles. The regular ticket fare between these stations was nine cents; the cash fare ten cents additional. According to the evidence and the special findings of the jury, the ticket office at Holiday was open for a reasonable time prior to the departure of the train, but appellee failed to provide himself with a ticket, but after the train had started tendered the nine cents for his fare, which was refused by the conductor, who demanded nineteen cents in accordance with the rules of the company. Appellee at first refused to pay more than nine cents, and then agreed to pay nineteen if the conductor would give him a receipt, which the conductor refusing to do, appellee refused to pay the fare, and he was ejected from the train by the conductor without violence, and in the language of the special finding of the jury, "the conductor in ejecting plaintiff (appellee) from the train acted in a reasonable, prudent, careful and discreet manner." The point where the appellee left the train was less than a fourth of a mile from the station at Holiday. No violence was used nor indignity offered to appellee by the

O. & M. Ry. Co. v. Burrow.

servants of appellant. After leaving the train he followed it on foot to his home in Cowden, and evidence was offered and permitted to go to the jury tending to show that at the time appellee was unwell, had been ruptured, and that the walk home had made him worse, and that he remained so for some weeks. The jury found a verdict for \$100, upon which judgment was rendered.

The only question raised by appellant is as to the amount of damages allowed by the jury. The conductor had no legal right to eject him at the point where he did, and hence appellant is liable; but what should be the measure of damages? Vindictive damages are not asked, it being conceded by appellee's counsel "that no such case was made as would raise such a question." It follows, then, that only such actual damages as would be the natural and proximate result of the unlawful ejectment can be allowed. Counsel for appellant insists that the damages should be such only as would compensate appellee for returning to the station, while appellee's counsel urge that appellee had a right to go home if he chose to walk instead of returning to the station. That he had the right to do so, no one would question; but we are inclined to think he should not hold appellant liable for any evil consequences that might result to himself. His walking that distance in the condition he was in, was calculated to aggravate his disease. He was practically at the station of Holiday; five or ten minutes walk would have taken him there. Had the conductor backed his train to the station and then ejected appellee, the latter would have no reason to complain. We are inclined to think the evidence in reference to his walking home and its results were improperly admitted to the jury. Reference is made to the Latimer case, but there is a wide distinction between the circumstances of that case and this. There a little girl about six years old, with a heavy bundle, was put off the train and left alone on the track, frightened and crying, to get back to the depot across an open culvert, and a wild train expected in a few moments to pass the point. If appellee had been ejected such a distance from Holiday as to have made it a debatable question in his mind, acting as a

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reasonable and prudent person, whether it were better for his health and safety to return to Holiday or proceed to Cowden, he would probably have had a right to adopt either course, and the bad results, if any, to his health, might with propriety be charged to his expulsion from the cars.

For the error indicated the judgment of the Circuit Court will be reversed, and the cause remanded.

Reversed and remanded.

32	164
61	442

32	164
69	331

32	164
87	99

82	164
97	159

THE PEOPLE EX REL. JOSEPH STICKEL

V.

COMMISSIONERS OF HIGHWAYS.

Mandamus—Duty of Highway Commissioners to Build Bridges—Discretion.

1. Commissioners of highways in towns organized under the township organization law can not be compelled by *mandamus* to build a bridge in place of one that has been entirely destroyed.

2. Whether or not a bridge should be built at a given time and place is a matter of opinion. The duty of building is a matter of discretion with the commissioners, and such discretion is not to be controlled by the courts.

[Opinion filed November 23, 1889.]

IN ERROR to the Circuit Court of Montgomery County; the Hon. J. J. PHILLIPS, Judge, presiding.

MESSRS. LANE & COOPER and GEORGE PEPPERDINE, for plaintiff in error.

The construction put on the statute in question by the Supreme Court (Commissioners v. Newell, 80 Ill. 587) is that the commissioners are expressly charged with the duty of making and repairing the roads and bridges in their townships, and are expressly required annually to levy and return to the county clerk a tax for that purpose, the very things that we

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are insisting that they should do in this case, and if they are expressly required to do this, then they have no discretion in the matter and *mandamus* will lie. It is averred in the petition that the road in question is a public highway, and as such has been used for more than thirty years; that for thirty years the public had kept a bridge over the creek at the point where said highway crosses the same, and that about six years ago the old bridge washed away, since which time the defendants have refused to build a bridge, though repeatedly requested so to do, although their township is abundantly able to build said bridge and the same is a public necessity.

A provision in a municipal charter that the council shall "cause the streets to be kept in repair" has been held not to confer a discretionary power, but to enforce a duty, the performance of which may be compelled by *mandamus*. 2 Dillon on Municipal Corporations, Sec. 673; Hammar v. City of Covington, 3 Met. (Ky.) 494; Uniontown v. Commonwealth, 34 Pa. St. 293.

These authorities fully sustain this doctrine, and the provisions of our statute being that "the commissioners of highways shall have charge of the roads and bridges of their respective towns and it shall be their duty to keep the same in repair," does not confer discretionary power, but enjoins a duty, the performance of which may be compelled by *mandamus*. 1 Dillon Mun. Corp. Sec. 62. Coke on Litt. 227, says that "discretion is to discern by the right line of law and not by the crooked cord of private opinion." See Watson v. Rodwell, 3 Ch. 380; King v. Archbishop, 15 East. 117; Hull v. Supervisors, 19 John. 260.

A *mandamus* will be issued commanding the performance of an act involving discretion but it will not be issued to control the discretion. In a proper case the suit will command action, but not to control discretion. People v. Lay, 78 N. Y. 43; McCreary v. Rogers, 35 Ark. 293; People v. Auditors, 82 N. Y. 80; People v. Supervisors, 45 N. Y. 196; Appling v. Baily, 44 Ala. 333; Commonwealth v. Henry, 49 Pa. 530; People v. Commissioners, 7 Wend. 474.

It is held by Moses on *Mandamus* that a railroad company

can be compelled by *mandamus* to build a bridge when the law charges them with that duty. (Pages 176 and 177.) He says on page 176: "It has been said that no better general rule can be laid down upon this subject than that where the charter of a corporation or the general statute in force and applicable to the subject imposes a specific duty either in terms or by fair and reasonable construction and implication, and there is no other specific or adequate remedy, the suit of *mandamus* will be available. But if the statute or the general law of the State affords any other specific and adequate remedy it must be refused."

This seems to be the law, and if so, how does the case at bar stand? The law clearly charges the commissioners of highways with the building of bridges and the repairing of the roads. The petition charges that they have ample means for this purpose at their command, and still they refuse to do anything after the public have waited for over five years. Is there any other remedy? If so, we hope the court will point it out to us, as we have been unable to find it. The general public want this bridge built, and are willing to pay for it in the way provided by law, but the defendants refuse to do anything, and now counsel talks to us of discretion when the plain letter of the law demands that the work shall be done. See *Boggs v. The C., B. & Q. R. R. Co.*, 54 Iowa, 435; *Weeden v. Town Council*, 98 Am. Dec. 375, note.

In the case at bar the writ may issue to compel the defendants to act, but we do not seek to interfere with their discretion as to the manner of their acting. See also *Arberry v. Beames*, 55 Am. Dec. 791 and note; and *People v. Jameson*, 40 Ill. 93 (89 Am. Dec. 337), and note; *Mobile and Texas R. v. State*, 112 U. S. 83.

Mr. JAMES M. TRUITT, for defendant in error.

PLEASANTS, P. J. This was a petition for a writ of *mandamus*, to compel the commissioners to levy a tax and build a bridge on the Taylorville road, over the middle fork of Shoal

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creek. It averred that this road had been a public highway, in use as such for thirty years; that a bridge had been built and kept in repair and use thereon over said creek during all that time, until about six years before the filing of the petition, when it was entirely washed out and destroyed; that since that event the road at that point has been impassable, the travel being compelled to cross the creek at a ford about sixty yards west of the bridge site, which, in times of high water, is from four to six feet deep, and is therefore worthless as a highway for at least four weeks in every year; that a suitable bridge would need to be of forty-eight feet span, with an approach of seventeen feet at each end, which would cost \$576.81; that the taxable property of the township, as assessed for the year 1886, was over \$400,000, and the levy for road and bridge purposes only fifteen cents per \$100 thereof; that the bridge is necessary, and the town abundantly able to build it, and that the commissioners have been requested to levy the requisite tax and build it, but refused to do so.

On demurrer thereto the court below held it insufficient and dismissed it.

This petition made as good a case as could be shown by affirmative averments for the allowance of the writ, if it should ever be allowed for the purpose stated. It may, therefore, be considered that the record fairly presents the question whether, in any case, commissioners of highways can lawfully be compelled, by *mandamus*, to build a new bridge in place of one that has been entirely destroyed.

The office of that writ is to enforce the performance of only such duties as are clearly, specifically and imperatively enjoined by law. Such duties are ministerial. Where the doing of the thing demanded is discretionary with the respondent, *mandamus* will not lie to compel it; and where it is an end which may be attained in different ways, by different means not specifically prescribed by law, it will not lie as to the ways and means, but only as to the end. So when the duty enjoined is simply to act or decide upon a particular case arising, it will lie to compel action or decision, but not its character or effect—how they shall act or what they shall do, their

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decision being discretionary; and where the duty claimed arises only upon a condition of fact to be found, and no other person, officer or tribunal is designated to find it, the authority to determine the question of its existence rests with the one charged with the duty so conditioned, and until the condition is so found, the duty prescribed can not be compelled. The character of the act or duty in question, tested by these elementary rules, will determine whether or how far its performance may be enforced by *mandamus*. The People ex rel. v. Dental Examiners, 110 Ill. 185-6.

Montgomery county is under township organization. The powers and duties of the commissioners are defined by positive law, and all the provisions bearing, or claimed to bear upon the question here, so far as we are advised, are to be found in sections 2, 5, 13, 14, 19 and 20 of chapter 121 of the Revised Statutes.

Section 2 gives them the "charge of the roads and bridges of their respective towns" and makes it their duty "to keep the same in repair and improve them so far as practicable"; also, "whenever the available means at their disposal will permit, to construct permanent roads, beginning where most needed."

By section 5 they are "to exercise such care and superintendence over roads and bridges as the public good may require."

Section 13 provides that annually, at a stated meeting, they shall "determine what per cent of tax shall be levied on the property of the town for road and bridge purposes, not exceeding sixty cents on each one hundred dollars;" and that "if, in the opinion of the commissioners, a greater levy is needed in view of some contingency, they may certify the same to the board of town auditors and the assessor, a majority of whom shall be a quorum, and with the consent of a majority of this entire board given in writing, an additional levy may be made of any sum not exceeding forty cents on the one hundred dollars of the taxable property of the town."

Section 19 enables them to obtain county aid "when it is

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necessary to construct or repair a bridge," and the conditions as to its cost and the means of the township are as therein expressed; provided, that "when it is determined by them to ask" it, they shall, before any contract for work or material or any other expense shall have been entered into, present their petition as therein prescribed.

And section 20 provides that "when the commissioners desire to expend on any bridge or other distinct and expensive work on the road a greater sum of money than is available to them by other means," they may have a town meeting called to vote on the proposition to issue its bonds to raise it.

From these provisions it is clear that commissioners have authority to build bridges on the lines of the public roads of their respective towns in the first instance and to rebuild them when destroyed, if, in their judgment, the public good demands it and they have in hand or can lawfully obtain the requisite means; and it follows that an intelligent sense of duty would require them in such cases to exercise it. But it does not necessarily follow that they may be compelled, in any case, to do so against their actual or declared judgment, by the extraordinary writ of *mandamus*. What other liabilities they may incur, if any, to be enforced in other proceedings, for a wilful neglect of duty or abuse of discretion, we are not now inquiring nor called upon to decide; but unless the performance demanded is absolutely and imperatively enjoined, leaving no discretion to be abused, this particular proceeding has no place. Then, does the statute expressly or by clear implication make the building of a bridge in any case imperative upon the commissioners?

The duty enjoined by the first clause of section 2, whether imperative or not, is limited in terms to "keeping in repair and improving" both roads and bridges. Applied to a bridge, as a distinct and independent subject, this must necessarily mean an existing bridge, and the repairs and improvements intended must be only such changes or additions as are designed to remedy its defects or increase its utility or convenience.

But it is claimed that a bridge on the line of a road is a

part of the road, so that when it is destroyed the road thereby becomes out of repair, and therefore to keep it in repair, a bridge must be built in place of the one destroyed.

We do not concede this minor premise, nor think the conclusion drawn would certainly follow if we did. While it is true that in one sense a bridge is part of the road, in the common understanding and in contemplation of the law it is quite distinct, being a wholly artificial structure, bearing a different name, wearing a different form, made of different materials, and subject, as a road proper is not, to decay by time and to destruction by accident, by wind or water or fire. It is rather to be regarded as a means of connecting different roads, or parts of the same naturally separated; and though operating in a manner different from that of some others, as a ferry, or, conceivably, a balloon, in that it avoids the necessity of a stop or change in the transit, and therefore more like a continuation of the road, yet we know that in common speech the two terms signify different things, notwithstanding they serve the same purpose and in like manner. The statute also uses both, as though neither included the other, and treats the two subjects separately; and in section 20 expressly recognizes a bridge as a "distinct * * * work on the road." But if a bridge destroyed had been a part of it in every sense, it would not follow in every case that the building of another would be the necessary or the best way to repair it. That would depend on the natural condition of the locality or other circumstances.

Possibly a causeway or fill (in case of a pond or dry chasm), a ferry, a ford, a change in the line of connection, would answer as well; or the vacation or abandonment of the road, in view of another, as fully accommodating the same travel would be the better policy.

We might, however, have omitted this bit of essay or criticism and dispensed of the point upon authority, which has expressly decided that the rebuilding of a bridge substantially destroyed is not among "the repairs contemplated by that section." *The People ex rel. Brokaw v. Commissioners of Highways*, 118 Ill. 243. So much further notice has been

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taken of it, because the argument for appellant seems to rely mainly on that provision.

The duty "to construct," imposed by the second clause of the same section, is in terms limited to "roads" and upon condition that they are "needed" to be found by the commissioners, since no other tribunal is indicated which is matter of opinion, and so involving the exercise of judgment and discretion.

Section 5 is of the same character, enjoining in general terms only "such care and superintendence of roads and bridges as the public good may require," they being judges.

Section 13 leaves the per cent of tax to be levied for road and bridge purposes to be determined by them in their discretion, limited only by the *maximum* thereby fixed. Of course they must determine the particular purposes also, if any there may be, to be accomplished by means of this power; and unless in their judgment bridge-building should be included among them they are not required to estimate and levy for it.

That the duty to exercise the power given by section 14 to levy in certain cases an additional amount, and that given by section 19 to apply for county aid to build a bridge, are not imperative, but discretionary, and not to be compelled by *mandamus*, was directly decided in the Brokaw case, *supra*, 118 Ill. 244-5. And that this is true of the authority to apply for the issue of town bonds conferred by Sec. 20, the only remaining one of those referred to, is sufficiently manifest from the language employed—"When the commissioners desire," etc.

It is not claimed that the statute in terms makes the duty in question imperative in any case; nor that any other provisions than those referred to contain an implication to that effect. On the contrary, all the powers expressly given to obtain the means required for its performance are discretionary. The obvious and sufficient reason for this, and which would remove any doubt that might otherwise remain, is to be found in the character of the duty itself.

Whether a road is obstructed or a bridge out of repair, is one of pure fact that any court or jury can determine upon

evidence of an actual, visible condition, which may be clearly seen and accurately described. The finding of the fact determines the duty absolutely. A road or bridge in public use, certainly ought to be kept in a condition that is reasonably safe and convenient for such use. A mere obstruction or defect, impairing its safety or convenience, ought to be removed or repaired, if practicable. A doubt about that can not exist in reason, and does not in law. The duty is therefore ministerial, and hence the statute imperatively enjoins it, and the courts will enforce its performance by *mandamus*, though the ways and means of performance, being various and depending on the character of the obstruction or defect, may be left to the choice of those who are charged with the duty.

But whether a bridge shall be built is always primarily and necessarily a question whether it ought to be built; whether, under the circumstances, it would be discreet to build it. That is not a matter of fact, but of opinion. Courts and juries are not organized nor competent to decide for anybody else, any such matter. Opinion is free, and from its nature can not be bound. This duty, then, being discretionary, and the propriety of its performance in every case necessarily matter of opinion and judgment, it would certainly be unreasonable to make its performance, in any, imperative. If it were so made, then the citizen least qualified to form a sound judgment in the matter, could compel its performance against the unanimous judgment of all the others—judges and jurors included—each one of whom has at least an equal claim to all the benefits of wise and proper action in the premises.

Without a clear expression on their part it is not to be presumed that the legislature intended to make it imperative. We find in the statute no such expression, and are of opinion they have not so made it. *Mandamus*, therefore, will not lie to compel its performance. *St. Clair County v. The People*, 85 Ill. 396.

Judgment affirmed.

CHARLES O. MCFARLAND

v.

THOMAS FORD.

*Evidence—Testimony of Witness Contradicted by Party Offering Him—
Character Can Not Be Directly Assailed—Instructions.*

1. While a party may not impeach the character of his own witness, he is not bound by his testimony and may contradict him by other witnesses, even though the evidence so offered may collaterally have the effect of showing the witness is unworthy of belief.

2. A clause in an instruction saying that the party producing a witness "is not permitted afterward to deny that such witness is worthy of belief," is ambiguous and erroneous, and in the circumstances of the case presented, tended to mislead the jury.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Vermillion County; the
Hon. E. P. VAIL, Judge, presiding.

Mr. J. B. MANN, for appellant.

Messrs. E. WINTER and F. BOOKWALTER, for appellee.

The appellant complains of appellee's third instruction, but, we think, without cause. We understand the rule to be, that where a party puts a witness on the stand, that he does thereby represent that he is worthy of belief, and can not impeach his general reputation for truth and veracity; nor can he, by his attorney, in the argument of the case to the jury, denounce the witness as unworthy of belief, as was done in this case. He may show the fact to be otherwise than as stated by the witness, by other testimony. The instruction complained of did not deny the right of appellant to do that, and in support of our position, we would cite the following authorities: Waller v. Carter, 8 Ill. App. 511; Toben v. Chicago City R. R. Co., 17 Ill. App. 82; Hill v. Ward, 2 Gilm. 296; Bates v. Bulkley, 2 Gilm. 394.

WALL, J. In this case the evidence was very conflicting, and it might be said with propriety that a finding either way would not be disturbed if there was no error of law in the record. One of the witnesses called for the plaintiff failed to testify as plaintiff evidently expected he would, and though not very definite, his testimony on the whole was favorable to the defendant. At the instance of the defendant the court gave the following instruction:

"When a party to a suit puts a witness on the stand he thereby vouches for said witness, and that said witness is worthy of belief, and the party placing said witness on the stand is not permitted afterward to deny that such witness is worthy of belief."

The rule on the subject is laid down by Greenleaf, as follows: "When a party offers a witness in proof of his cause he thereby in general represents him as worthy of belief. He is presumed to know the character of the witnesses he adduces, and having thus presented them to the court the law will not permit the party afterward to impeach their general reputation for truth, or impugn their credibility by general evidence tending to show them to be unworthy of belief." Sec. 442. "But it is exceedingly clear that the party calling the witness is not precluded from proving the truth of any particular fact, by any other competent testimony in direct contradiction to what said witness may have testified, and this not only where it appears that the witness was innocently mistaken, but even where the evidence may collaterally have the effect of showing that he was generally unworthy of belief." Sec. 443. And so the rule is understood in this State. *Rockwood v. Poundstone*, 38 Ill. 199; *Tobin v. C. C. Ry. Co.*, 17 Ill. App. 82. While a party may not impeach the character of his own witness, he is not bound by his testimony, and may contradict him by other witnesses, even though the evidence so offered may collaterally have the effect of showing the witness is unworthy of credit.

This rule of law is rather for the guidance of the court in determining what evidence is admissible than for the information of the jury.

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Indeed it is difficult to see what occasion there would be to thus advise the jury in such a case as this, if in any case. No impeaching testimony was before the jury, but there was testimony in contradiction of the witness referred to, and the jury, when seeking to apply this instruction to the evidence, would naturally assume it was applicable to such contradictory proof. It must have had this effect if it had any. The last clause is at best somewhat ambiguous and inaccurate in saying that the party producing the witness "is not permitted afterward to *deny* that such witness is worthy of belief." In one way he *may*, in a certain sense, deny the credibility of the witness, that is, by producing such an array of contradictory proof as to overwhelm and extinguish him.

It was error to give the instruction and we are of opinion that it manifestly tended to mislead the jury. The judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

JOHN W. GARBER

v.

KEZIAH MYERS, ADMINISTRATRIX, ETC.

Power of Attorney—Revocation by Death.

The recital in a power of attorney of the specific purpose for which it was given, to wit, to collect a debt due the constituent, and with the proceeds pay an obligation of his, does not affect its character as a naked power, nor presently divest or invest an interest in the fund; and the collection of the debt by the attorney, after the death of the constituent, and the application of the proceeds to the payment of the specified obligation of deceased, does not release deceased's debtor from subsequently paying the administrator.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Tazewell County; the Hon. N. W. GREEN, Judge, presiding.

Mr. J. W. DOUGHERTY, for appellant.

Mr. B. S. PRETTYMAN, for appellee.

PLEASANTS, P. J. Appellant was to pay appellee's decedent, for a lease of certain land assigned to him, \$40 on September 1, 1887, and \$150 annually thereafter for four years. On the 22d of May, 1887, in contemplation of a trip west, the deceased executed to John W. Dougherty a formal power of attorney to collect this money or any other that might be due to him, to prosecute and defend suits, and generally to attend to any business in which he might be interested, in Tazewell county or elsewhere. On the 24th he borrowed of Denhart & Company \$225 on his note, signed also by G. R. Hornish, at thirty months, with interest; and on the same day signed a paper, witnessed by Dougherty, reciting the suretyship of Hornish on said note, his own desire "to secure and indemnify him against loss in case he should have to pay it," and the indebtedness of appellant to him as above stated, and authorizing his "agent," said Dougherty, "to collect said rents and apply the same to the payment of said notes when due." The lease, with the assignment thereunder written, was left with Dougherty, and on it when offered in evidence there appeared receipts of \$40 as of August 29, 1887, and of \$150 as of August 11, 1888. Myers died intestate while on a visit at the residence of his son, in Iowa, on the 10th of August, 1887, and letters of administration were issued to his widow, the appellee, on the 8th of August, 1888. Soon after, she exhibited them to appellant, and as administratrix made demand of what had become due for the lease assigned to him, which he refused, claiming that he had paid it to Dougherty at the time specified in the receipt referred to, and denying her right to collect them if he had not. Thereupon on November 10, 1888, she brought this suit before a justice of the peace, which, on appeal from his judgment, was tried by a court without a jury, and resulted in a judgment in her favor for \$190.

The only question is, whether the payment so made to Dougherty after the death of Myers extinguished the claim of his estate *pro tanto*. It involves nothing but the construc-

Garber v. Myers.

tion of these two instruments, and in our opinion there is but little room for it in either. The first was a power of attorney in the usual form, for and in the name, place and stead of the constituent, to attend to his business generally, and including specifically the collection of this indebtedness coming due from the appellant. Not being coupled with any interest in the attorney it was revoked by the death of Myers. The other also was but a naked power of attorney, though not in the usual form, and limited to the collection and application of this indebtedness. Its recital of the specific purpose for which it was given did not affect its character as a naked power in Dougherty, nor presently divest or invest any existing interest in the fund. It was a simple declaration of an intention, then entertained, not even amounting to a promise to pay a certain note out of that fund; and while the execution of the power would inure to the benefit of the surety thereon and of the holder, it was none the less to be for and on behalf of Myers and in his name, place and stead. This was not such an assignment or appropriation of the fund as would give them, or either of them, a specific lien upon it, at law or in equity. They could not have collected it rightfully in their own name or otherwise, by virtue of anything contained in that paper. Authority to do so was thereby given to Dougherty alone, on the ground of personal confidence, and as the mere agent of the giver. It also was therefore revocable at his pleasure, during life, and was revoked by his death.

This view of it, in reference to the rights of Hornish and of Denhart & Company, seems to us to be in accord with the law as now well settled. *Rogers v. Hosack's Exec'r*, 18 Wend. 319; *Christinas v. Russell*, 14 Wall. 70; *Hunt v. Rosmier*, 8 Wheat. 174, 201; *Nevil v. Jackson*, 5 Pet. 580.

We hold, then, that the two payments in question—the first of which was made nineteen days after the death of Myers—did not bind his estate nor bar the claim here made; nor is the case changed by the fact, if it be a fact, that the sum last paid was applied on the note before this suit was brought.

Judgment affirmed.

HENRY ALLPHIN
v.
ADAM M. WORKING.

Master and Servant—Recovery of Wages.

Judgment of the court below, in an action on an account for labor performed, is affirmed, without review in the opinion, of the several items.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Hancock County; the Hon. C. J. SCOFIELD, Judge, presiding.

Messrs. MACK & SON, for appellant.

Messrs. O'HARA & SCOFIELD and W. H. MEAD, for appellee.

Per Curiam. This action was in assumpsit to recover, by appellee against appellant, for work done for him at Leoti, Kansas, in the construction of several buildings at that point, and for failure on the part of appellant to pay the amount claimed to be due under the contracts and arrangements entered into between the parties. The record is quite voluminous and involves considerable labor to investigate the various items of account and payment. This we have done and feel satisfied that the *remittitur* entered, of \$400, cured the error of the verdict, and that the judgment of \$1,062.39 is a fair and legal adjustment of the matters in dispute between the parties.

It would serve no useful purpose to review the evidence, and the various questions suggested by counsel upon the matters of account between the parties.

Believing as we do that the judgment is right, and that no substantial error was committed by the court below, the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

City of Champaign v. Jones.

CITY OF CHAMPAIGN

V.

SARAH E. JONES.

32	179
50	545

Municipal Corporations—Personal Injuries—Action against City for Negligence—Injury the Result of Negligence and Accident Combined—Liability of Defendant.

1. Where an injury is the result of accident and the fault of the defendant combined, and each is necessary in the combination to produce the injury, the defendant is liable therefor.

2. In an action against a city for alleged negligence in the care of its streets, where the evidence showed that, on the first of March, the mud and slush had been scraped to the middle of the street, and allowed to remain there in a ridge over night, when it froze, and was not removed for a week, when the accident occurred, this court holds that the jury were warranted in finding that the city was guilty of negligence.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Champaign County; the Hon. C. B. SMITH, Judge, presiding.

Messrs. S. PHILBRICK, GEORGE W. GERR and E. L. SWEET, for appellant.

Messrs. RAY & SLAUSON, for appellee.

PLEASANTS, J. The city of Champaign, in undertaking to clean its main street, which was paved with brick, on the 2d of March, 1888, caused the mud and dirt thereon to be scraped together in a row along the middle of it, which on that night there froze solid, and so remained until after the 9th, when the injury for which this action was brought was received. As appellee, on that day, in a two-wheeled cart drawn by an old and gentle horse, was driving on an easy trot between a hitched team and the mudrow, the team suddenly backed, whereat her horse swerved toward the mudrow, causing the

left wheel to strike it, and the cart to be so tilted, and its motion so arrested as to throw her out. For the injury thereby sustained, which was severe and permanent, she recovered judgment below for \$2,000. No complaint is here made of the amount awarded her, if the city is liable at all, nor of any action of the court except its refusal to set aside the verdict as being against the law and the evidence. But it is said that this mud, after it was so frozen, could not be removed without the use of the pick, which would endanger the pavement; that the condition of the street was patent and known to the appellee; and that her own carelessness in attempting to pass the hitched team on a trot, in so narrow a way, was the cause of the injury. The case of the City of Centralia v. Krouse, 64 Ill. 19, is cited and relied on as decisive of this.

There the dangerous condition of the sidewalk was wholly due to a disastrous fire, followed by sleet, and the city was in no way at fault, while the plaintiff saw the danger of the attempt to pass over it and took the risk, though there was a safer way that was only a little longer. *Lovinguth v. City of Bloomington*, 71 Ill. 238; *City of Quincy v. Barker*, 81 Id. 300, and *C. B. & Q. R. R. Co. v. Dougherty*, 12 Ill. App. 189, also cited, are all cases of contributory negligence. In none of them do we see any likeness in principle to the case at bar. Here the condition of the street complained of was due to the time and manner of doing the work. For these the city alone was responsible; and whether there was carelessness in choosing them as it did was a question for the jury. The street superintendent says: "When it was first shoveled up the stuff was slushy, kind of running, and without having a water-bed you couldn't haul it." A jury might think it carelessness to have it shoveled up until he could haul it; certainly it was less dangerous and inconvenient as spread over the street, than as shoveled up in the middle of it. And he ought to have known that slushy stuff like that, exposed to the weather in this climate, is liable to freeze in any night about the first of March, and to remain frozen for days. So, the jury might have found it easily practicable, by a reasonably careful use of the pick, and therefore a reasonable duty of

Ritchie v. Village of Warrensburg.

the city, to remove it or a substantial part of it, promptly. They must have found it negligent in some of these particulars, and we are not prepared to say it is clear the evidence did not warrant such finding.

But the street was not closed. The city authorities invited its use, notwithstanding the mudrow. It was the principal business street of the city, and they knew it was and would be used and occupied as before by teams and vehicles hitched and in motion. On the occasion in question there was no apparent danger in appellee's attempt to drive between the ridge and the hitched team. Any ordinarily competent driver with an ordinarily safe horse might make it without incurring the imputation of rashness or carelessness. She was an experienced driver, with a very safe horse. Her injury was not caused by her own act or neglect, as in cases of contributory negligence. There was room enough for her passage, and her driving was good enough to make it safely. Her injury was attributable in part to accident—the restlessness and backing of the other team—for which nobody was to blame; but in part also to the mudrow, without which it would not have been done; and for this the city alone was responsible. Where an injury is the result of accident, and the fault of the defendant combined, and each is necessary in the combination to produce it, the defendant is liable. *City of Joliet v. Verney*, 35 Ill. 58; *City of Bloomington v. Bay*, 42 Ill. 503; *City of Lacon v. Pace*, 48 Ill. 500; *Village of Centerville v. Cook*, opinion lately filed at Mt. Vernon, but not yet reported.

Judgment affirmed.

SAMUEL RITCHIE
v.
VILLAGE OF WARRENSBURG.

Practice—Prosecution under Village Ordinance—Appeal from Justice.

1. Although a motion appears in the record, yet where it bears no file

mark and it does not appear that it was brought to the attention of the court below, no error can be held to have been committed regarding it.

2. Where on trial in the County Court of an appeal from a justice, papers are missing which the transcript shows to have been issued by the justice, the proper practice is to issue a rule on the justice to send them up, or if they have been lost to require the plaintiffs to supply copies.

3. An objection to the admission of evidence can not be urged here, the same not having been specifically called to the attention of the trial court.

[Opinion filed November 23, 1889.]

APPEAL from the County Court of Macon County; the Hon. W. E. NELSON, Judge, presiding.

Mr. I. D. WALKER, for appellant.

Messrs. MILLIS BROTHERS, for appellee.

WALL, J. This was a prosecution begun before a justice of the peace for violation of section 17, ordinance No. 3 of the village of Warrensburg. The defendant was fined \$3 by the justice and appealed to the County Court, where upon a trial by jury he was again found guilty and the same fine was imposed. By further appeal the case is brought here. It is urged that the court erred in not dismissing the case for the reason there was no complaint or warrant on file. Such a motion appears in the record but it bears no file mark and it does not appear that it was ever brought to the notice of the court. Hence there was no error committed by the court in regard to it.

The transcript from the justice of the peace shows there was a complaint for violating the section of ordinance above named, and if these papers were missing the correct practice would have been to enter a rule upon the justice to send them up or if there was reason to believe they were lost or destroyed, the plaintiffs might have been required to supply copies.

It is objected the court erred in admitting the ordinance in evidence.

The only reason suggested to the court for not permitting

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the ordinance to be read, was that the complaint and warrant were not among the files. This, of course, was not a valid objection.

The transcript sufficiently showed what section of the ordinance the suit was based upon and if parties went to trial without the original complaint or a copy of it, there was no occasion to exclude the evidence, because of the absence of such papers. Nor is it competent now to urge an objection not then specifically presented to the court. *Doyle v. Village of Bradford*, 90 Ill. 416; *Garrick v. Chamberlain*, 97 Ill. 620.

The remaining objection, that the verdict is against the evidence, must also be overruled.

There was sufficient proof to warrant the jury in finding defendant guilty, and though there was conflict in this respect and though the degree of guilt was not extreme, as is attested by the small fine imposed, we are not inclined to interfere.

The judgment is affirmed.

Judgment affirmed.

SARAH FLEMING

v.

SAMUEL G. WEAGLEY ET AL.

Practice—Fraudulent Conveyances—Cross-Bill—Attempt to File without Leave of Court—Not Constructive Notice—Laches—Husband and Wife—Husband as Witness.

1. A paper filed by a third party in an equity case, purporting to be a cross-bill, without leave of court, is not constructive notice to the parties to the action of the claims therein set up.

2. Whether or not the complaining party in an equity suit has been guilty of such *laches* as to bar his right to relief depends largely upon the circumstances of the particular case, and the final decision of the question is largely committed to the chancellor.

3. In an action by creditors of the husband to set aside a conveyance of real property made to the wife by the husband, the latter is a competent witness for the wife.

4. The husband has the right to prefer the claim of his wife to that of other creditors.

5. In the case presented, this court holds that there was no sufficient evidence to impeach the conveyance to the wife as fraudulent, the creditor not having any lien at the time the conveyance was made, and there being evidence to show that the property in question was purchased with funds derived from the wife's estate.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Morgan County; the Hon. C. EPLER, Judge, presiding.

Mr. M. T. LAYMAN, for appellant.

Messrs. BROWN & KIRBY, for appellees.

PLEASANTS, P. J. On March 4, 1883, Weagley and Boyce, as creditors of Robert C. Johnson, filed their bill in chancery, to set aside a deed of conveyance by said Johnson and Eliza J., his wife, to Martin H. Cassell, of certain lots in Jacksonville, executed on the 17th of August, 1876, and another of the same date from said Cassell to said Eliza J., of the same lots, and to subject said lots to the payment of their claim. The three parties to these deeds only were made defendants.

On the 13th of June, 1883, Johnson and his wife filed their answer denying the fraud charged in the bill, and setting up several distinct defenses—among others, that before the execution of these deeds the equitable title to said lots was in Mrs. Johnson, that complainants' claim arose out of transactions subsequent to the execution of said deeds, of which complainants then had notice, and that the defendant Robert C. Johnson retained an abundance of means to pay all his existing liabilities.

On the 19th of September, 1883, appellant here filed a paper in the case which purported to be a cross-bill, rehearsing the facts alleged in the original bill, and averring that at the time of the execution of said deeds she held a note signed by said Johnson as surety, for \$850; that at the May term, 1877, she obtained judgment thereon against him and Peter Tilton (the principal) for \$1,038.89 and costs, on which execution was

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issued July 9, 1877, and returned October 5, 1877, unsatisfied; that this judgment was prior to that of Weagley and Boyce, who, with the defendants in the original bill, are named defendants; and that said conveyances were fraudulent and void as to creditors. It asks that they be set aside and the lots sold to satisfy her judgment, and for general relief.

After several continuances, on motion of the complainants in the original bill, this paper was stricken from the files December 13, 1887, for the reasons that appellant was not a defendant to the original bill and had filed the paper without an answer and without the leave of court. She then obtained leave to interplead as defendant to said bill, and to answer the same and file a cross-bill, and in pursuance thereof, on the 26th of that month filed her answer denying, on information and belief, the allegations of the bill, and averring as in the paper that had been stricken, and also re-filed that paper as a cross-bill.

The defendants Johnson and wife answered this cross-bill, admitting the note, judgment, execution and return as therein alleged, and that said judgment was prior to that of Weagley and Boyce, but denying that she had any lien upon the lots at the time of the conveyances attacked, or that they were made to defraud creditors, and claiming that the lots had been purchased with money of Mrs. Johnson and the equitable title was in her. They also claimed that the statute of limitations had run against her judgment before she filed the cross-bill. Weagley and Boyce also answered, denying all the material allegations in said cross-bill. Appellant afterward obtained leave to amend it, and on the 27th of December, 1888, filed an amendment averring that her judgment was revived by *scire facias* on May 19, 1888, that execution on the revived judgment was issued September 8, 1888, and returned unsatisfied, and that said judgment is in full force.

The amended cross-bill was dismissed on motion of defendants for the reason that when the original was filed she had no enforceable judgment; but leave was given her to withdraw and re-file it as an original, which she did. The defendants Johnson answered as to the former cross-bill and

amended cross-bill, setting up the same grounds of right to make the conveyances complained of as were stated in their answer to the original bill, denying that the judgment of appellant had been revived and execution thereupon issued and returned as alleged, and claiming that by her own *laches* she had lost whatever right she might have had to the relief here sought.

The issues having been made up and proofs taken, the court, on final hearing, dismissed both the original and cross-bills, from which decree, so far as related to the cross-bill, the complainant therein took this appeal.

On what particular ground the court based its action, we are not advised. The premises in question are the homestead of the appellees; the conveyances assailed were recorded on October 9, 1876, and the appellees have been in actual occupation of them continuously from that time. Appellant's judgment was obtained in May, 1877. If she can be said to have asserted her claim in September, 1883, when she filed the paper that was stricken, there was a long delay for which no reason has been given. But that paper was not constructive notice to appellees of the claim here made, and whether they had actual notice of it or of that paper before December, 1887, when the motion was made to strike it from the files, does not appear. If they had, it was no better than a verbal notice given on the street, which would not be an act of diligence in the sense of the law. The earliest assertion of her present claim that could be considered effective was made December 26, 1887, and that was when her judgment could not have been enforced against any property of Robert C. Johnson. And since what is *laches* depends so much upon the special circumstances, its determination is so far committed to the chancellor that if he regarded the neglect and delay here appearing as sufficient reason for dismissing the cross-bill we ought not to overrule his judgment. But whether he did so regard it we are not advised; and in another view of the case we deem it unnecessary to express our own opinion upon that question. That view makes it also unnecessary to decide whether the amount and character

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of the property retained by Johnson would justify the gift of that in question to his wife. We think the decree was fairly supported by the evidence tending to show that these conveyances were not without a valuable and sufficient consideration.

Johnson married his wife in 1856. They both testified that in 1861 her father purchased and caused to be conveyed to her certain lands, which she sold to Charles Pratt for \$2,300; that it was then expressly agreed between them that this money should be invested for her benefit, and when, with the profits, it should come to be enough to pay for a home for herself and children, satisfactory to her, it should be so applied and the deed therefor be taken in her name. He states a series of purchases and sales following, in each instance at an advanced price, and that these purchases were made, first, with the money received from Pratt, and thereafter with the proceeds of preceding sales; that with a portion of the money so increased he purchased of R. G. Grierson, on March 20, 1869, for \$2,250, the lots in question, then unimproved, and for the house he built thereon and the other improvements paid \$6,450, out of the same fund, and other money from her share of the proceeds of Missouri land belonging to the estate of her father; that not a dollar of his own means was put into the property; and that, though he took the deed on the several purchases mentioned in his own name, he believed his wife did not know it. All of the deeds referred to were put in evidence, and so far as they go, confirm his statements and show an increase of the fund to \$6,000.

Mrs. Johnson testified to the same express agreement with her husband, to the same understanding as to the investments, and to her ignorance of the fact that the deeds of the lands so purchased were not in her name, until just before the conveyances here in question were executed. Appellant then had no lien on the property.

There was no evidence in contradiction of any of these statements. On behalf of appellant, Mrs. Loar, a near neighbor and intimate friend of the Johnsons, stated that she heard both of them at different times speak of these conveyances about the time they were executed—Mr. Johnson, she

thought, before that time—but was uncertain as to dates. The substance of what they said, as she understood it, was that they were made or to be made “to keep from paying this security debt of Mr. Tilton.” Mr. Johnson stated that he had no recollection of any such remark and was not clear as to any conversation with her on that subject, but might have said to her he owed his wife, or had this arrangement with her, and thought it his duty to make this title in her before he paid any security debt. Mrs. Johnson denied that she so stated, and said she did not then know her husband was security on a note of Tilton, or indebted on any note.

Appellant also took and introduced the deposition of Mrs. Boyce, the widow of Mrs. Johnson’s brother; but as it all related to gifts of money by their father to his children—inferentially of \$500 to each—long before his gift to Mrs. Johnson of the land from which they claim to have derived the means that paid for their homestead, we fail to see its relevancy here. It does not tend to disprove that claim.

And if their testimony is to be believed this homestead property was specifically due from Johnson to his wife. At the time of these conveyances there was no lien upon it. He had a right to put the title in his wife for the purpose of securing it to her against any that were threatened. The statement to Mrs. Loar, as she relates it, is no evidence of an intention to defraud appellant, although the effect of the conveyance was and was intended to be to prevent her from making her debt out of that property. He had the right so to prefer the claim of his wife. *Tomlinson v. Mathews*, 98 Ill. 178, and cases there cited. He was a competent witness for her. *Eads v. Thompson*, 109 Ill. 87.

The court properly overruled the offer of appellant to prove that the controversy with Weagley and Boyce had been compromised and settled. It could have no bearing on any issue between her and the Johnsons. Perceiving no error in this record the decree will be affirmed.

Decree affirmed.

Meyers v. Meyers.

CELIA ANN MEYERS

V.

BENJAMIN MEYERS.

Parent and Child—Adoption—Appeal.

An appeal to the Circuit Court will not lie from an order entered by the County Court for the adoption of a child under the provisions of Chap. 4, R. 8.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Coles County; the Hon. J. F. HUGHES, Judge, presiding.

Mr. F. K. DUNN, for appellant.

Messrs. CRAIG & CRAIG, for appellee.

CONGER, J. Benjamin Meyers filed a petition in the County Court of Coles County, under the provisions of Chap. 4 of the Revised Statutes, entitled, "Adoption of Children," for the adoption of Luella May Meyers; "alleges that she is a female child about seven years old; that her mother, Celia Ann Meyers, is a resident of St. Louis, Missouri, and does not consent to the adoption; that petitioner is the grandfather of said child and its father is unknown to petitioner; that petitioner has had the custody, control and education of the child since her birth; that she was abandoned when two years old by her mother, who has since followed a life of prostitution and not contributed anything to the support of said child; that petitioner's wife is dead and he is able financially to care for said child, owning eighty acres of land in Humbolt Township, worth \$3,200, and personal property worth about \$600. Prayer for an order of adoption."

The County Court made the order of adoption as prayed for, whereupon appellant, the mother of the child, prayed for

and obtained an appeal to the Circuit Court, when, upon motion of appellee, her appeal was dismissed, from which order, dismissing the appeal, she brings the record to this court for review. The only question involved is, does an appeal lie to the Circuit Court from an order of the County Court in such cases.

We think the Circuit Court held rightly that no appeal would lie. No provision is made in Chap. 4 for an appeal, and we think the principles announced in the case of *The People ex rel. v. Gilbert*, 115 Ill. 59, and in the case of *Cramer v. Forbis*, decided by this court at the last November term, should govern in this case.

The proceeding is to provide homes for children who may be so unfortunate as to have none; it is a summary statutory proceeding; it does not bind the parents, as they are not parties to the proceeding, but they or either of them, if they think their children are unlawfully taken or withheld from their custody, may have an investigation under a writ of *habeas corpus* to ascertain and assert their rights.

The decree of the Circuit Court dismissing the appeal will be affirmed.

Decree affirmed.

MARTIN LEINWEBER

v.

THE FOREST CITY INSURANCE COMPANY.

Fire Insurance—Action on Premium Note—Alleged Fraud of Insurance Agents—Evidence—Rebuttal—Instructions—Error without Prejudice.

1. In an action on a promissory note given for the premiums on policies of insurance, to which the defense was that the company's agent fraudulently misrepresented to defendant the contents of the application signed by defendant at the time the note was given, the weight of the evidence being strongly against the truth of the allegations of fraud, this court declines to interfere with verdict for plaintiff.

2. The refusal of the court to admit evidence on a question which, by other evidence in the case, was conclusively settled against the party excepting, does not constitute reversible error.

Leinweber v. Forest City Ins. Co.

3. Although instructions given to a jury might, as abstract propositions of law, require qualification, yet such qualifications may be rendered unnecessary by undisputed evidence in the case.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Mason County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Messrs. H. R. NORTHRUP and JOSIAH JACKSON, for appellant.

Messrs. WALLACE & LACEY, for appellee.

PLEASANTS, P. J. This suit was brought on a promissory note of appellant to appellee for \$375, dated August 10, 1882, and due September 1, 1883. It was agreed that under the general issue, any good defense might be shown as under an appropriate special plea. There was a trial by jury, verdict for plaintiff, and judgment thereon for \$413.

The note was given for the premium on six policies of insurance, numbered respectively, in regular order, from 22,122 to 22,127 inclusive, for \$12,000 in all, and running for five years from the date of the applications, which was the same as that of the note. Appellant was a large farmer, owning some twelve hundred acres of land, on which, besides his own, he pastured a considerable number of cattle belonging to other parties. The first in order of these policies was for \$10,200, and covered, among other things, "his horses, mules, colts and cattle on the farm or in the neighborhood," insuring them for \$3,200 against loss by "fire, lightning and tornado."

In April, 1883, a storm killed twenty-four head of cattle on the place, of which only two belonged to appellant. The loss on these was adjusted at \$60, and settled by a credit of that amount indorsed on the note July 26, 1883; but because the company declined to pay him for the others, and for no other reason, according to his own statement, he refused to pay his premium note, or any part of it.

The defense rested on the allegation that the company's

agents who took it, promised him insurance upon all the stock on the place, to whomsoever belonging, and fraudulently represented that his application, prepared by them, was so made; that he signed those papers in consideration of and reliance upon that promise and representation; that he is a German, unable to read or write English, and did not know, until the company refused to pay for the agisted cattle killed, that the application and policy did not cover them; and that within a reasonable time thereafter he rescinded the contract and returned all the policies.

It appears that the arrangement for insurance was made with Mr. Sherratt, then the general agent, and since January, 1887, assistant secretary of the company. Mr. John O'Dowd was with him, but what particular relation he sustained to it was not stated. He was not a witness on the trial, and Mr. Sherratt did not know where he was, but testified that though he might have said something during the preliminary conversations, the whole of the negotiation and transaction was between appellant and himself. After they had gone over the place together and looked at the buildings and other property, of which he made memoranda, they returned to appellant's dwelling house, and there the papers were made out by Sherratt and signed by appellant. Several others were there, who heard different portions of the conversation at different places, and testified to their recollection of its substance.

It would certainly appear from their statements that appellant in the course of it did inform these agents that his own stock was mortgaged and that he was pasturing some belonging to other parties. As one puts it, he "objected" to insuring, for those reasons, and they told him they could insure it all for him notwithstanding, and that they wanted to do so. But there is less evidence to show that such was the understanding finally arrived at before the papers were signed, and still less that either of said agents represented, after the application was made out, that it contemplated the insurance of stock on the place belonging to other parties.

It is clear that no such insurance is contemplated by the

application, or by the policy, which strictly corresponds with it. Sherratt testified that appellant did not say he wanted to insure any such stock, and with special emphasis that "no representations were made by him that this insurance would cover any property except his own;" and further, that he read to him each of the six applications in full, together with the note, before they were signed. Appellant himself, on his first cross-examination, was asked this question: "At the time they took the applications for this insurance didn't the agent read the applications over to you?" and his answer was "Yes, sir." Mr. Hiliken, his hired man, testified that he read over one of them to him before it was filled out, and remarked to him at the time that he "thought it pretty good insurance," a thought and remark that were not sensible nor probable if the paper was only a blank form. At a later stage appellant, being recalled, stated that "they read only a part of them and before they were filled out"—a useless and senseless proceeding. He admitted that his hired man and members of his family could have read them to him, but he did not ask them to do so. No witness mentioned an act or word of these agents which, upon a review of the transaction, appears to have been intended or of itself calculated to prevent his having them read to him, unless it be their statement that it was all right. He received this policy, with the others, about the 21st of August, 1882, kept it in his possession at his home until the adjustment, eleven months afterward, was then informed by the adjuster that it did not cover stock belonging to others, and that for the loss of his own the company would pay by crediting the amount on this note—all of which was testified to by himself—and thereupon, on the 26th of July, 1883, with all this information and knowledge, he voluntarily signed and delivered the following receipt: "Received of the Forest City Insurance Company, of Rockford, Illinois, sixty dollars, in full of all demands for loss or damage by fire, lightning or tornado, to property insured under policy No. 22,122, and destroyed by either lightning or tornado on the 22d of April, 1883."

If there was any fact or circumstance tending to explain,

qualify or impair the effect of this receipt as a ratification of the contract of insurance and an admission of his obligation upon the note according to its tenor, and therefore also as evidence that there had been no fraudulent misrepresentation made or deceit used to obtain it, we do not find it in this record.

These were questions for the jury, and an error that would justify the disturbance of a verdict for the plaintiff upon this evidence, must be gross indeed. We discover none that appears to be material.

It is said the court erred in refusing, upon the plaintiff's objection, to admit parol evidence that Sherratt himself gave the description, in the application, of the barn therein mentioned to be insured for \$500; that he saw it and knew its proper description, but so misdescribed it as a "frame barn," when, in fact, it was made of "poles set in the ground and thatched over with prairie grass," that defendant could not have recovered for it, in case of loss, under the policy. This alleged misdescription is said to show a fraudulent intention not to pay.

The description or misdescription was given in an answer among others, in writing, and signed by the defendant. There was no claim of misrepresentation by the agents in respect to it, and therefore the writing was conclusive upon the question, who gave it. Defendant had already testified that his reason for refusing to pay his note was that the company had refused to pay him for the loss of cattle of Harry Hughes. If the testimony excluded was proper at all, it was as part of his defense in chief; but it was not offered until after the plaintiff's evidence in rebuttal had been closed. The barn intended having been seen by the company's agents at the time of taking the application, could have been sufficiently identified in case of its loss, though it was not properly described as a frame barn; and therefore such a misdescription was no evidence of a fraudulent intent. We think there was no serious error in its rejection.

Defendant was asked, "What was said about insuring the cattle against death from any cause?" which was objected to

Leinweber v. Forest City Ins. Co.

and excluded. It is said that was the kind of insurance promised, and that there was a failure of consideration to the extent of the difference in value between such, and the limited kind he got. If this was error it certainly did no harm; for notwithstanding the exclusion of that particular question at that time, the record shows evidence enough on the point in view, to settle it against him. Thus Matthews says, "The agent stated they wanted to insure it against fire or anything else;" but the defendant said, some time after the question above was excluded, "I understood that the stock was insured against fire, lightning and storms. I wanted the stock insured against storms. The other property was not." Hiliken, his hired man, says: "The agents said it was insurance against loss by fire, lightning and storms." It has been already observed that defendant made no complaint except that he was not insured against loss of cattle other than his own.

The court sustained objections to other questions calling for what was said in the preliminary talk, to show the actual agreement, holding it to have been merged in the writing. We think on that point the court was right. *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199. But the matter was received upon the question of fraud in reducing it to writing and obtaining defendant's signature thereto, and the jury were instructed with sufficient liberality to him, as to its bearing in that direction. Among others, the following was given:

"In this case if you should believe from the evidence that the plaintiff, by its agents, made false and fraudulent statements in regard to the insurance of the defendant's property, knowing them to be false, for the purpose of getting the note offered in evidence, and that the defendant believed them to be true and relied upon them and was thereby induced to execute said note, then he would have the right, when he received such policies, to repudiate such contract, and would not be bound thereby, provided he rescinded the contract as soon as he received the policies or within a reasonable time thereafter."

Another included the proposition that "if the plaintiff had failed to execute a part of its promises given to the defendant

which induced him to execute the note," the jury should allow to the defendant a deduction to the extent of such failure of consideration.

Those for the plaintiff relating to the legal effect of the receipt, and of a failure of defendant to ascertain the contents of the policies when he received them, or within a reasonable time thereafter, as abstract propositions might need to be qualified, but the evidence in this case, which is undisputed, made such qualification unnecessary.

We think no injury was done to defendant by any error of the court, and that the verdict was right.

Judgment affirmed.

32 196
70 408

THE ILLINOIS CENTRAL RAILROAD COMPANY

V.

ALEXANDER BURNS.

Railroads—Injury to Stock—Evidence as to Experiments—Rebuttal—Discretion of Court—Instructions.

1. In an action against a railroad company for injury to stock on its track, where the main question was whether or not the engineer could, by the exercise of reasonable care, have seen the animals in time to avoid the accident, evidence of experiments made to determine the distance from the point of the accident at which the stock could have been seen by the engineer was admissible, although the conditions of the experiments were not precisely those existing at the time of the accident.

2. The admission of such testimony in rebuttal was discretionary with the court below.

3. In an instruction on the subject of the engineer's duty to keep a lookout for obstructions upon the track, the phrase "ordinary care" would be presumed to mean such care as the engineer could reasonably exercise in keeping a lookout, taking into consideration his other duties.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Sangamon County; the
Hon. J. A. CREIGHTON, Judge, presiding.

Messrs. PALMER & SHUTT, for appellant.

Messrs. PATTON & HAMILTON, for appellee.

CORDELL, J. This was an action brought by appellee against appellant to recover damages for the killing of appellee's horses, by the train of appellant upon its railroad between Springfield and Clinton. The verdict and judgment were for \$550.

The principal question was, as to whether the engineer by the exercise of reasonable care could have seen the animals in time to have avoided the injury. The objections urged upon the part of appellant are principally two, the admission of improper testimony and giving an improper instruction.

As a part of the evidence for the defense, appellant had given the result of certain experiments, made by placing a train in the position, as nearly as possible, of the one causing the injury, and detailing to the jury the opinion of those taking part therein, of how far away at certain points upon the track the horses could probably have been seen from the engine.

In rebuttal appellee was permitted by the court to give the result of an experiment made by himself and witnesses, made after appellant's evidence upon the subject had been given, in which they had placed a man on a ladder in the track, intending thereby to raise his head to the same height as though he were standing in the cab of a locomotive, and then placing others in the ditch at the point where it was claimed the horses were, and giving to the jury the result of such observations.

Counsel for appellant, in their brief, make their objection to this testimony in the following language, which we quote, "It is difficult to classify testimony of the character of this under consideration. The defendant offered proof of experiments carefully conducted by the engineer in charge of the same train under the identical conditions, in order to determine the distance necessary to stop the train at that point, when it was moving at the same rate of speed. In addition, the persons who conducted these experiments were experts,

whose opinions would have been admissible upon the points involved upon general, well understood principles.

In the experiments made by the witnesses, Fagan and Guyant, there is no pretense that the conditions of the experiments were identical with those of the actual transaction.

The primary question before the jury was as to the actual distance as well as the position of the engineer at the time, when he could have seen the horses on the track. These points of inquiry were supposed to involve the question of reasonable care on the part of the engineer to observe the animals on the track and control the engine to avoid injury to them. The hypothetical experiments of the witnesses lack all the elements which are necessary to render such testimony admissible. The experiment did not include all the facts necessary for a comparison between the results obtained and the actual facts of the transaction, but the facts assumed are confessedly unlike the actual facts. The witnesses were confessedly without experience in the operation of trains upon railroads. The actual facts of the transaction were fully detailed to the jury by witnesses who knew them, and were unimpeached. The mischief which would result from the admission of testimony of this class is too obvious to need discussion."

There is no good reason for rejecting appellee's evidence of experiments, because not made by appliances as perfect, or by witnesses with as much experience and knowledge as those of appellee.

In so far as the experiments made failed to comply with the true condition of things at the time of the accident, the results obtained would not be as satisfactory and convincing to the jury as when all the conditions of the experiment were precisely like those existing at the time of the accident, and the jury should and doubtless did make allowance for these imperfect conditions.

But to say that appellant may place an engine at a given point, and permit an engineer standing thereon to state to the jury at what distance horses at the side of the track could be observed, and deny to appellee the right to show the result of

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experiments made by himself or his witnesses, because he can not place an engine at the point of observation, but is compelled to use something else to bring his line of vision as nearly as may be to the place the engineer would occupy, would not be in accordance with reason or justice.

As to this evidence having been admitted upon rebuttal, it was entirely within the discretion of the trial court, and we see no such abuse of discretion as would call for interference.

There was but one instruction given for appellee, which was as follows :

"The court instructs the jury, that if they believe from the evidence that the engineer, by the exercise of ordinary care, could have seen the plaintiff's horses in time to have avoided striking them, and that by the reason of the failure of said engineer to exercise such ordinary care, said horses were injured, then the jury should find for the plaintiff."

It is urged that this instruction "assumes that it was the duty of the engineer in charge of the train to look out for animals upon the track, and then, alike regardless of all other considerations of duty, avoid striking them."

We do not think this instruction subject to the objection made. Ordinary care would be such care as the engineer could reasonably exercise in keeping a lookout, taking into consideration his other duties, and we do not think a jury would understand the language of this instruction in any other light.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

GEORGE I. BROWN

v.

JOSEPH WALKER.

Replevin—Identity of Pigs—Alleged Improper Remark of Trial Judge—Instructions.

1. In an action of replevin, brought to recover possession of some pigs, where the question was one of identity, which was in some respects a

matter of opinion, the verdict of the jury is entitled to the same weight as upon a pure question of fact.

2. A ruling of the trial court on a question of admitting certain testimony, can not be complained of where the complaining party received the benefit of all the evidence of the witness to which he was entitled.

3. An instruction setting forth that the jury in determining the credibility of witnesses should take into consideration their interest in the result of the suit, and the relationship of any of them to either party to the suit, or any other feeling or interest they may appear to have in the case, is proper.

4. In the case presented, this court holds that certain remarks of the trial judge made in the course of the trial can not be complained of.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Clark County; the Hon. J. F. HUGHES, Judge, presiding.

Messrs. S. S. WHITEHEAD and J. W. GRAHAM, for appellant.

Messrs. GOLDEN & HAMILL, for appellee.

Per Curiam. This was an action of replevin for six pigs, begun before a justice and appealed to the Circuit Court. Verdict and judgment for plaintiff. The question involved was one of identity, and more than twenty witnesses were examined upon it. Many on each side were confident, for reasons stated. A more appropriate case for final decision by a jury could hardly be imagined. A verdict either way, in such a case, should stand undisturbed, unless material error in law had intervened.

It is suggested the same defense is not due to the finding here as where there is a conflict of evidence as to facts and the credibility of witnesses is to be determined; that here there was no such conflict; that the facts were uncontroverted and the testimony could have been reconciled; and that thereupon the verdict should, indeed must, have been for the defendant.

Plaintiff's witnesses testified to facts respecting plaintiff's pigs, which were uncontroverted as to them, but these may all have been untrue as to the pigs he replevied. Defendant's

witnesses testified to many facts concerning defendant's pigs, which were also uncontroverted, but these may all have been untrue as to the pigs in controversy. Each side so claimed. The facts stated on both could not have been true as to those in controversy, but only those stated on one. Who but the jury was to determine which? They are to determine what witnesses are mistaken as to opinions founded on facts undisputed, where such opinions are admissible, and the application of such facts to the subject in controversy, as upon a question of identity no less conclusively than where facts only are involved, which depend on the memory, intelligence, attention or veracity of the witnesses.

The action of the court in several particulars is complained of. While the constable, with the plaintiff and others, was driving the pigs from defendant's premises under the writ of replevin, defendant's father appeared on the scene, and had some conversation with Mr. Evinger, of plaintiff's party, about the ownership of the property. He did not state that plaintiff heard or could have heard it. On the contrary he said he could not *so* state; and all he said on that point, further, was: "I guess he has ears; he was not very far off." The court might, therefore, have properly excluded the whole conversation. But the witness went on, without objection, stating what he claimed as to the ownership, and what Evinger said, until he said, "I told him if he was as anxious to pay his honest debts—" when counsel for plaintiff interposed an objection "to the conversation" which the court sustained, with the remark, "I don't think anything said there will settle this question," in relation to which the record states that "counsel for defendant excepts," but whether to the language of the judge or to the exclusion of the testimony does not appear therefrom. The complaint here made is of the language, and several cases are cited to show its impropriety. We have examined these authorities and think them inapplicable. The judge expressed no opinion as to the weight of any evidence admitted, but simply a legal opinion as to evidence offered, or being given—excluding it. If counsel knew of anything the witness could have stated that bound the plaintiff by reason of his presence,

hearing and silence, and which was pertinent, he should have called the court's attention to it, and offered to prove it. So far as then appeared the conversation was immaterial and improper, and the witness was apparently beginning an impertinent and offensive remark. It was high time then, for the judge, of his own motion, to arrest it and exclude the whole matter. He did it upon objection made, and, as we think, in a manner that was sufficiently mild. His language simply expressed his legal opinion that "the conversation" was immaterial, and had no relation to anything else that might have been said by or to or in the hearing of plaintiff on that occasion.

Plaintiff claimed and introduced evidence tending to prove that his pigs were marked with a swallow fork in their ears, and that the ears of those in controversy had been recently cut off, but that in some of them the mark was still visible. Defendant claimed they had been frozen off and not cut, and introduced evidence tending to prove that the ears of these and also of other pigs on his place had been frozen. He called Dr. Tobey, as an expert, to testify to his observation of the ears of other hogs on defendant's place, "said to have been frozen off during the same winter," and "to give the conditions as to the effect of freezing." The court said "he can do that without the interview about the hogs on Brown's place, if he is an expert," and excluded the proposed evidence as to them. This is claimed to have been error. It appears that the witness then went on and gave his opinion about the ears of the pigs in controversy, from personal examination of them, and also from comparison of them with those of other hogs he observed, and with the ears of some he knew to have been cut. We think the defendant got the full benefit of all the evidence he was entitled to, notwithstanding the ruling in question. The witness stated that on the Monday preceding his examination as a witness he "examined Mr. Walker's hogs on his place and those in controversy, Mr. Simmon's hogs and the hogs of defendant, Brown," and gave his opinion, on the subjects of inquiry, fully, with his reasons therefor. If anything sought to be put in the case was shut out by this ruling, counsel has not indicated it

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and we do not discover it from the record, unless it was an "interview" with the defendant. We therefore deem it unnecessary to pass upon the propriety of the ruling.

By agreement the court instructed the jury orally, and, among other things, in so doing, said: "In determining the credibility of witnesses you will take into consideration their interest in the result of the suit, and the relationship of any of the witnesses to either party to the suit, or any other feeling or interest they may appear to have in the case." It is said this tells the jury that relatives have interest and feeling because they are relatives, and discredits them.

We do not so understand it, nor do we perceive any valid objection to it. The court assumed nothing as to any matter of fact, nor expressed any opinion as to the credibility of any witness, but left it exclusively to the jury, to be determined, on grounds alike and equally applicable to the witnesses on each side—grounds clearly recognized by law and sound reason, and always urged in argument to the jury, where they apply.

It is also objected that in the course of his instruction the judge said that the controversy ought to end with that trial. This was said as a reason why the jury "should make an earnest effort to agree." In this class of cases there is apt to be unusual difficulty in reaching an agreement, and the costs of a single trial is usually out of all proportion to the value of the property in controversy. The remark was natural and not inappropriate. It certainly was impartial in all its bearing. The entire charge as it appears in the record seems to us eminently simple, clear, brief and fair.

Perceiving no material error in the case the judgment will be affirmed.

Judgment affirmed.

JOB COATES
v.
JOHN HARMON.

Negotiable Instruments—Note—Signature on Face by Payee—Understanding of Parties—Instructions.

1. Where a payee places his name with the maker on the face of a note for the purpose of constituting himself a joint maker, such signature can not be treated by a third party as a blank indorsement.

2. If a payee signs a note at the time it is executed by the maker, and upon an understanding that it shall only serve as a memorandum between them, no subsequent statement by the payee, in the absence of the maker, will render the latter liable to a third person.

3. In the case presented, this court holds that certain instructions given in behalf of plaintiff, touching indorsements in blank, should have been so qualified as to show that the position of the signature of the payee raised no presumption that it was intended as an indorsement, and that one refused on behalf of defendant, touching, among other things, the alleged understanding upon which the payee's signature was written, should have been given.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Morgan County; the
Hon. GEORGE W. HERDMAN, Judge, presiding.

This was an action brought by appellee, claiming as an indorsee upon a promissory note. The case was originally brought in a justice court, whence it was removed by appeal to the court below. Three trials were had before juries, each resulting in a verdict for the plaintiff. The two former verdicts were set aside by the court. On the last judgment was entered and this appeal taken by the defendant.

In February, 1882, John Meredith held an auction sale of cattle and other property in Franklin, Morgan county. The appellant purchased at such sale two steers for \$126. According to the testimony of appellant and Meredith, at this time Meredith owed Coates on a note, \$200. This note had been

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left by appellant at home. According to the testimony of Meredith and Coates it was then agreed that Meredith should sign a note from Coates to himself, and that it should stand as a memorandum of the amount with which Meredith should be credited, when he should settle his note for \$200 held by Coates. The truth of this testimony of Coates and Meredith is disputed by appellee.

This note, with others, was placed by Meredith in the Jacksonville National Bank without indorsement or assignment. During this time Meredith was buying and shipping cattle and appellee had guaranteed to the bank payment of any overdrafts he might make in this business.

The note in controversy was not paid by Coates and remained at the bank until 1886. It was then given to appellee, who wrote over the signature of John Meredith, "pay to the order of John Harmon," and brought suit thereon in his own name.

A copy of the note is as follows:

"\$126.

FRANKLIN, Feb. 3, 1882.

Six months after date we promise to pay to the order of John Meredith, one hundred and twenty-six dollars, at 8 per cent. from date, if not paid at maturity. Value received.

(Signed)

JOB COATES,
JOHN MEREDITH."

MESSRS BROWN & KIRBY, for appellant.

MESSRS OWEN P. THOMPSON and W. P. CALLON, for appellee.

CONGER, J. Without determining the disputed questions of fact in this case, the judgment of the Circuit Court will have to be reversed for errors which we deem material in the instructions, especially the fifth and seventh, of appellee, and in refusing to give appellant's eighth instruction. The testimony of the parties was direct and explicit that the note was only intended as a memorandum of the amount of the purchase by Coates, to be afterward placed as a credit upon the note which Coates claimed to hold upon Meredith, and equally

explicit that Meredith's name was placed upon the face of the note below Coates' at the time of its execution, and with the intention and purpose, on the part of Meredith, of making himself a joint maker with Coates of the note. Now, if such was his purpose in signing the note, it could not be treated by a third person as a blank indorsement of the note.

The fifth instruction of appellee in substance tells the jury that if Meredith indorsed the note in blank, that is, by signing his name thereon without date, then appellee might treat such signature as an indorsement in blank, and that appellee would, if the note had been properly delivered to him by the bank, be presumed to be the *bona fide* owner of such note; and by the seventh they are told that an indorsement in blank is the signing his name by the payee upon the note without mentioning the assignee.

While these propositions of law are correct in general, we think as used in this case they tended to mislead the jury. They might have understood that, finding Meredith's name written below Coates', apparently as a joint maker, would give rise to the same presumption as if they had found it upon the back of the note. It is true in appellant's instructions, as given by the court, the jury are told that the note upon its face appears to be the joint note of Coates and Meredith, but we are of opinion that under the peculiar facts in reference to this note the instructions alluded to should not have been given without some qualification showing the jury clearly that the manner of Meredith's signature would raise no presumption that it was intended as an indorsement of the note. The following instruction presented by appellant was refused:

"8th. The court instructs the jury, for the defendant, that if they believe from the evidence that John Meredith signed the note sued on at the same time that it was signed by the defendant, Coates, and upon an understanding between him and Coates that the same should serve only as evidence of the amount which Meredith should be credited upon a settlement between them, then no subsequent statement made by Meredith, in the absence of Coates, would make Coates liable to any other person upon said note."

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We think this should have been given, as it clearly stated the law, and we find nothing in the instructions given which supplies its place.

For the errors indicated the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

JAMES DOWDALL
v.
ALSIE A. CANNEDY.

*Administration—Transfer of Interest—Subsequent Sale—Fraudulent
Misrepresentations—Cancellation of Deeds—Interest.*

1. The denial of the petition of a legatee for an order on the administrator to pay a balance claimed to be due over and above the sum paid for the legatee's interest by said administrator, who, subsequent to the purchase, sold the property in question by order of court, can not operate as a bar to a bill in behalf of the legatee to set aside the conveyances made, upon the ground of fraudulent procurement.

2. Honest misstatements by an administrator as to the legal effect of the provisions of a will do not constitute fraud.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Greene County; the
Hon. G. W. HERDMAN, Judge, presiding.

Mr. MARK MEYERSTEIN, for appellant.

Mr. JOHN G. HENDERSON and RINAKER & RINAKER, for
appellee.

PLEASANTS, P. J. The parties to this suit are brother and sister residing in the county of Greene. George L. Dowdall, another brother, who resides in Macoupin, died there on the 6th of June, 1879, leaving a will by which he devised all his

real estate to his wife for her life, and in case she should have issue by a future marriage, to her and such issue in fee, but if she should die without issue, then that at her death it should be sold and the proceeds equally divided between his father, brothers, sister, sister-in-law, and two half sisters jointly, making eight equal parts. The same disposition was made of his personal property. His wife was named to be his executrix, but she did not survive him, and he left no descendant. On the 1st day of July, appellant was duly appointed administrator with the will annexed. As such, in the fall of that year he made sale of the personal effects, which realized about enough to pay the debts. In November, 1880, he purchased of appellee her interest in the real estate for \$1,200 cash, and took a conveyance thereof in the form of two quit-claim deeds, the land lying in two counties. In August, 1881, he sold all the real estate, under an order of the County Court, to Don A. Burke for \$11,750, one-half cash, and the balance in a note, at one year, with interest at eight per cent. In November following appellee filed her petition to that court for an order on appellant as such administrator to pay over to her the balance of the share of the proceeds of said estate to which she was entitled under the will, after deducting the \$1,200 paid to her as above stated, which petition he successfully resisted, the court holding that by virtue of the quit-claim deeds mentioned she had ceased to have any interest in said estate. On her appeal from that order denying her petition the Circuit Court held the same way and affirmed it. Thereupon on the 12th day of January, 1885, she filed the bill herein, praying to have said deeds canceled, and for the relief sought by said petition.

It sets forth the facts above stated, excepting the filing of said petition and the proceedings therein, and avers that before she was informed of the provisions of the will or of her rights thereunder, and before defendant, as administrator, had made any report of the condition of said estate, he came to her and solicited the purchase of her interest in it; that she then told him she did not know what it amounted to, nor what right or power she had to sell or convey it, nor when

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she would be entitled to it or any part of it; that he told her he didn't know just what it would amount to; that there were debts coming against the estate of which he had not heard until recently; that the land would have to be divided by a partition suit, which would involve cost and expense and delay; that there now was a minor heir less than a year old, which she knew was a fact; that he then further stated that the land could not be divided, nor the proceeds thereof, until said minor was of age; that complainant therefore might not receive anything from them in her lifetime; and that he would then, November 6, 1880, give her in ready money the sum of \$1,200, for all her interest in said estate; that knowing he was a man of business experience, and well acquainted with the condition of the estate and the provisions of the will, and having confidence in him and in his disposition toward her "as her brother and as the trustee, as it were, of her interests," she accepted all his statements as true, and sold and conveyed all her interest in the real and personal estate of the testator on the terms proposed. It then avers that she afterward discovered he had "grossly deceived" her in respect to the condition of the estate and the terms and effect of the will, and as to when the land could be divided and when she could obtain her share of the proceeds of the sale of the same; that from his reports thereafter made by him as administrator it appeared that of the proceeds of real and personal property of the estate she was entitled, for her share as heir and under the will, to \$1,939.92.

Besides the averment that he had "grossly deceived" her, as above set forth, all that the bill contains as a charge of fraud is the following: "That by the abuse of her confidence in his fairness and good faith, and by the disregard of his duty in the premises, and the abuse and betrayal of his trust, seeking to speculate upon the trust funds so being in his hands to administer and to wrongfully deprive youratrix of her fair share of said estate, he has wronged and cheated her out of more than one entire third of her just net share of said estate." A demurrer to this bill was overruled and the defendant answered, denying the gravamen thereof, and set-

ting up as a further bar the order and judgment of the Circuit and County Court above referred to, as having been made upon a hearing on the same grounds of claim here relied on. To these special matters in the answer exceptions were filed, the consideration of which was reserved to the final hearing.

Upon the pleadings and the proofs taken and reported by the master, the court found that said sale and conveyance was procured to be made by the fraudulent representations and deceptions practiced by defendant, and abuse of confidence reposed in him by his sister, the complainant, because of his relationship to her and of his being administrator with the will annexed of said estate, and thereupon decreed the sale and deeds void and canceled, and that defendant account for and pay over to her so much of the proceeds of his sale of said lands and of the personal estate as she was entitled to, to-wit, thirty-five two hundred twenty-fourths of the same, with interest from the date of the filing of the bill, which on further reference to the master to ascertain and compute, was found and decreed to be (including interest to November 24, 1888, the date of the decree, amounting to \$131.83) the sum of \$895.23. Exceptions were duly taken to the master's reports and to the several orders and decrees of the court.

Upon the assumption that this sale by appellant was obtained by fraud, we do not think she had a remedy at law, either in the Probate or Circuit Court, nor that the judgments of those courts upon her petition referred to were such adjudications as would bar the relief sought by this bill. The deeds of conveyance stood in the way, an insurmountable obstacle. The direct object of the bill was to remove it by their cancellation, and the power to cancel them was in the chancellor alone. Obtaining jurisdiction for that purpose he would retain it to do complete justice in the premises between the parties. But we are clearly of opinion that no proper case was here made for the rightful exercise of that power.

Besides the documents introduced, the only evidence in the record is the testimony of complainant and her husband, in her behalf, and of the defendant in his own. At the time of the sale

in question she was about fifty years of age, for many of which she had been, as she then was, living with her husband, who was something over sixty, on their farm in Greene county. Habitual or frequent personal association with the defendant had thus been long broken up and her life identified with that of a nearer and dearer one. She consulted her husband most fully throughout this whole transaction. The purchase of her interest was not proposed until June, 1880, nearly or quite a year after the death of the testator and probate of the will. Within two weeks after his death she was correctly informed of the provisions of the will and of her interest in the estate. With her husband she had attended the sale of the personal property, which took place on the farm, the fall before; and according to her own statement, she found out that night or the next morning what it amounted to. She also says she knew there was a considerable indebtedness against the estate. She did not know the amount of that. But the defendant was then also ignorant of it, as debts were coming in and the estate was not settled until April, 1885; and yet he told her he thought the personal property would pay all the debts. She had often before been on the land, and was qualified by experience, as was her husband, to form an opinion of its character, condition and value. She distinctly admitted that she knew as fully and well as did the defendant, the will, the devisees, the estate and her interest therein. He offered her for it the sum of \$1,000, in cash. She conferred with her husband and made inquiry about it of others—among whom she named Ike Powell, a relative—and having so satisfied herself that it was not enough, she so informed him, saying she was going to try to sell to somebody and that if he, the defendant, didn't buy it, some one else would. She also stated what was not true—that Powell had offered \$1,200; to which he replied that if anybody would give that amount he would, as he did not want a stranger to have it. Again she consulted and inquired. Powell hadn't the money. Her husband was in debt and paying interest. They wanted cash. They didn't get another offer of \$1,200, cash. After talking over the matter between themselves, according to his statement,

they "came to the conclusion that if what he said in regard to the situation of the real estate—that we could not have it sold under the will without a decree—we expected it was as good as we could do to take \$1,200." And so they said to him, "Now if this is the situation of things, as you have stated, and if you are willing for us to go up there and ask Mat's and Ike's advice about the matter, and if they advise us not to sell it we will not do it, but if they don't advise us that way we will sell it for \$1,200." He assented. She advised him of her acceptance, and she procured Powell to prepare the deeds. She signed them before her husband did, and upon his objecting to sign, defendant told them to "drop it all and burn the deeds;" but, as she says, "he studied it over, I guess, and signed."

All of the foregoing is taken from her testimony, excepting the single statement quoted as from his, from which it would seem she was quite as active in working up the sale as the defendant. There was no appearance of pressure or urgency or even persuasion on his part, nor of any special confidence in him on hers. She acted on her own judgment and that of her husband and other friends, as if he had been a stranger. So far as relates to his knowledge and influence and her ignorance and confidence, her testimony is in direct contradiction of the averments in the bill; and her husband's, relating to the same fact, accords with it.

But whatever may have been the truth in that respect we have looked in vain through the bill, proofs, decrees and argument for the specification of a word, an act or an omission on the part of appellant that is charged, proved, found or asserted to have been fraudulent. The same witnesses positively and completely exonerate him. Complainant testified, "I don't pretend to say that my brother here deceived me wilfully, but he did buy that land of me when it was worth more than he said it was. I know this, because he sold it for more." That is her case in a nutshell, as she understood it. It amounts to this: that she thought now, it was worth more when she sold than she thought then. And her thought was but an inference from a single fact which did not warrant it.

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When she sold, there was no railroad near the land, nor any in contemplation, so far as the parties were informed. Soon afterward it began to be talked of, and when he sold—more than nine months later—it had been surveyed and located and a station near the land determined on. The worth of the land was what it would bring. She sold for \$1,200, cash, and he, nearly a year after, for \$1,468.75, one-half cash and the other on a year's time. Such an enhancement in that time is no uncommon effect of the location of a railroad in the vicinity.

Again, she testified, "I would not say my brother told me a falsehood * * * but he did misrepresent things to me." Being asked in what respect, or how, she said he told her it couldn't be sold under the law without a decree of court, which would involve a considerable cost, and that the land was not in as good condition as when the testator died, because the fences had gone down and the crops were poor, and he didn't consider it worth near as much as before that time. She was then requested, "If he ever made any other misrepresentation, please state it. And her answer was: "I don't know as I can think of it. I wouldn't say that he did." And she added, "I don't pretend to say that these statements were false, but I do pretend to say that it was worth more, because it brought more." The bill contained not a word about any representation as to fences or crops, nor is there in the record a word of proof that the fences had not gone down or that the crops were not poor. Neither the complainant nor her husband denied the truth of anything they say he stated as matter of fact. He charges no misrepresentation except as to the necessity of a decree of court in order to have the land sold, which was, that it could not be lawfully sold, while there was a minor heir, without such a decree. They knew that was matter of opinion, and that appellant did not profess any special knowledge of the law, nor represent that he had taken any legal advice on the subject. If he expressed only his real opinion, then, however mistaken, it could not have been fraudulent.

That it was his honest opinion and belief is put beyond

doubt by his oaths and his acts. If he had supposed he had power to sell, there was no reason for refusing or delaying to exercise it. It was desirable that the parties interested, including himself, should realize and control their respective interests as soon as might be. But it is evident that they understood they had an interest in the land itself, as tenants in common; for they talked of dividing as well as of selling it. What appellant proposed to buy and appellee to sell was her interest in the land. Their contract was executed by a deed of quit-claim of her interest in the land specifically described. He understood that his office and function were those of an administrator, notwithstanding the annex, and that as such, having no need to sell in order to pay debts of the estate, he had nothing to do with the land, but its disposition rested with the heirs or devisees. They all knew that one of them, Hayden Dowdall, had died very soon after the death of the testator, leaving an infant child, and it was plain to him that this little child could not take a binding part in a partition or sale. Hence the supposed necessity for a decree of court. Appellant swears that he fully so believed, until advised to the contrary by the county judge long after he had made the purchase from appellee. By direction of that officer he filed his petition for leave to sell, and made the sale in conformity with the order so obtained.

We think it was quite easy and natural for a man who was not a lawyer, and especially for one of "large business experience," to make all the mistakes appellant did, and to be so confident in his opinion as to want no lawyer's advice about it. To entertain such an opinion and to express it and to act upon it without such advice, may not be very wise or prudent, but certainly it is not fraudulent.

In our opinion, then, if the bill states a case of fraud by wilful misrepresentation of facts and abuse of confidence—which is by no means clear—it finds no substantial support in the proof. The decree, annulling the contract of sale and canceling the deeds, was therefore erroneous. And if the court below was not justified as to the relief by the case made it could grant none further, for want of jurisdiction. Hence

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it is unnecessary to inquire into the particulars of the decree, although we do not see from the record on what ground the master and court found the share of complainant, which the bill and the will stated as exactly one-eighth of the proceeds of the personal as well as of the real estate, to be so much more nearly one-seventh. They also charged appellant with the rent of the land accrued after the death of the testator, and also with the interest on the note given by Burke for half of the price on its sale to him. While he might be properly so charged in favor of the other parties, who retained their interests in the land or its proceeds, he should not be in favor of appellee if he had lawfully bought hers. Appellant testified that the personal estate proper, all went to the payment of debts of the estate.

But for the reasons above given the decree will be reversed and the cause remanded for further proceedings not inconsistent with the views herein expressed.

Reversed and remanded.

SAMPSON B. RAWLINGS

V.

THE VILLAGE OF CERRO GORDO.

Municipal Corporations—Hawkers and Peddlers—Agents and Canvassers—Licenses—Sec. 63, Chap. 24, R. S.—Practice—Finding by this Court.

1. Canvassing or taking orders for books, pictures, etc., is not peddling or hawking within the meaning of the statute authorizing municipal corporations to license or prohibit the same.
2. An ordinance providing that a person engaged in canvassing or taking orders shall be required to take out a peddler's license, is void.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Piatt County; the Hon. E. P. VAIL, Judge, presiding.

Messrs. S. R. REED and H. H. CREA, for appellant.

Mr. W. C. JOHNS, for appellee.

WALL, J. The village of Cerro Gordo ordained:

"Section 1. No person shall attempt to sell, or sell any goods, articles or things (except farm products offered for sale by the producer thereof) by peddling, hawking or public outcry, or at any temporary or uninclosed stand or place of business, without obtaining a peddler's license therefor, under a penalty of five dollars for each offense; provided, that the village trustees may in their discretion, by vote or resolution, exempt any person, having been a *bona fide* resident of the village for six months, from the provisions hereof, or may order license to be granted to such person at a lower rate than is hereinafter specified.

"Section 2. Every person canvassing or taking orders for books, pictures, publications or other articles, shall be deemed within the scope of this division and be required to take out a peddler's license; if, however, no license was taken out by the canvasser, the article shall not be delivered without a peddler's license; provided, that regular commercial travelers employed by wholesale houses and selling staple articles to merchants of the village, shall not be deemed to be within the meaning of this section."

The authority to pass this ordinance must be found, if it exists, in Chap. 24, Sec. 63, par. 41 and 96, which read thus: "The city council in cities, and the president and the board of trustees in villages, shall have the following powers:

"Forty-first. To license, tax, regulate suppress and prohibit hawkers, peddlers etc., and to revoke such license at pleasure."

"Ninety-six. To pass all ordinances, rules and make all regulations proper or necessary to carry into effect the powers granted to cities or villages, with such fines or penalties as the city council or board of trustees shall deem proper; provided, no fine or penalty shall exceed \$200, and no imprisonment shall exceed six months for one offense."

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The question is whether the statute supports the second section of the ordinance. By that section the village undertook to say that persons canvassing or taking orders for books, pictures, publications or other articles should be deemed peddlers. Bouvier's Law Dictionary, Vol. 2, page 323, defines peddlers thus: "Persons who travel about the country with merchandise for the purpose of selling it." Webster's definition is, "A traveling trader; one who carries small commodities about on his back or in a cart or wagon and sells them." We are of opinion that the business aimed at by the second section of the ordinance can not be termed peddling, and that persons so occupied are not peddlers. It may be that there would be as much reason for requiring a license in the one case as the other and there may be many occupations which should be taxed by means of a license as well as peddlers, but that is beside the question. The power of the village is to be found in the provision of the statute and the authority thereby conferred can not be exceeded. "Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied." 1 Dillon on Municipal Corporations, Secs. 55 and 251; Magor v. Cincinnati, 1 O. St. 268. It follows that said section is void for want of power in the village to enact it.

The appellant was charged with selling groceries and dry goods by peddling and hawking without license. The proof was that he went about carrying samples of sugar, tea, coffee, etc., in a sample case, taking orders for goods addressed to a mercantile house in Chicago by whom the orders were to be filled and the goods sent per express C. O. D. to the persons giving the orders. The appellant represented himself as the agent of the Chicago house. This is not peddling nor hawking and unless section No. 2 of the ordinance is valid the offense charged was not made out.

The case was tried by the court without a jury, and certain propositions of law taking in substance the view above stated were submitted to the court to be held as the law of the case. But the court refused to so hold and finding appellant guilty

imposed a fine of \$10 and costs. In so doing we think the court erred. The judgment will therefore be reversed.

Judgment reversed.

The clerk will incorporate in the final order a special finding of fact by this court that upon the evidence as contained in the record appellant was not guilty of the offense of peddling and hawking as charged in the amended complaint.

THE CHICAGO & ALTON RAILROAD COMPANY

V.

ALFRED LEGG.

Railroads—Injury to Stock—Evidence—Opinion—Instructions—Watchfulness—Duty of Trainmen—Damages.

1. In an action against a railroad company to recover for injuries to stock struck by a train upon its track, the judgment of a witness, derived from an observation of the tracks, of the animals, and other indications, as to the place where they came thereon and as to their direction and speed, is admissible in evidence.

2. Testimony as to experiments made by witnesses to determine whether stock could have been seen by the servants of a railroad company before coming upon its track, the character of the ground and obstructions to the view at the place in question being involved, is admissible.

3. It is the duty of trainmen to use ordinary care in looking ahead, and in discovering whether or not any obstructions are on the track. It is not sufficient to use due care after animals are discovered, if, by the use thereof, they might have been seen in time to avoid an accident.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Mason County; the Hon. L. LACEY, Judge, presiding.

Messrs. BROWN & KIRBY, for appellant.

As to all of the rulings on the questions quoted (see opinion) the court below was in error. It was competent for the

32	218
70	456
32	218
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witness to state and describe the horses' tracks, but it was not for him to tell what conclusions he arrived at. It was the jury's province to do that. His conclusion was a mere opinion.

That this evidence was improperly admitted is settled in this State by the following cases: *Linn v. Sigsbee*, 67 Ill. 75; *Chicago v. McGivin*, 78 Ill. 347; *Penn. Co. v. Conlan*, 101 Ill. 93. See also *Clark v. Fisher*, 1 Paige, 174; *Mayor of New York v. Pentz*, 24 Wend. 668; *Ramage v. Ryan*, 9 Bingham, 333; *Norman v. Wells*, 17 Wendell, 136; *Hopkins v. I. & St. L. R. Co.*, 78 Ill. 32; *C. & N. R. Co. v. S. & N. R. Co.*, 67 Ill. 142; *Keith v. Bliss*, 10 Ill. App. 424; *Collins v. Crocker*, 15 Ill. App. 109.

The evidence of the experiments made in October, three months after the accident, in the absence of proof that the conditions were the same, is inadmissible from any standpoint.

As to the instructions, the rule of law applicable to such case is laid down in *I. C. R. Co. v. Godfrey*, 71 Ill. 509.

"If defendant's servants, who were in the management of the engine, after becoming aware of plaintiff's danger, failed to use ordinary care to avoid injuring him, defendant might be liable."

In *T. W. & W. v. Barlow*, 71 Ill. 640, it is said:

"The rule of liability in such a case as the present, when an animal is unlawfully upon a railroad track, we conceive to be, that the company is not, in general, liable, unless its servants, after they discovered that the animal was in danger, might, by the exercise of proper care and prudence, have prevented the injury." Citing *Redfield on Rys.*, Sec. 126; *Godfrey v. Ill. C. R. Co.*, 71 Ill. 500; see also *C. & A. R. Co. v. Hill*, 24 Ill. App. 619.

Messrs. G. W. ELLSBERRY, T. N. MEHAN and E. LYNCH, for appellee.

Opposing counsel contend that the court erred in giving all or any of appellee's instructions, and in ignoring appellant's theory that its engineer was not guilty of negligence if he

used ordinary care to avoid injuring the animals after he discovered them, even though in the exercise of such care he might have seen them in time to have avoided the collision altogether. The bare statement of this theory at once suggests its harshness and unsoundness. Such was substantially the rule in this State many years ago, but it was overruled and forever laid to rest in *I. C. R. R. Co. v. Middlesworth*, 46 Ill. 497. In *R. R. I. & St. L. R. R. Co. v. Irish*, 72 Ill. 406, the court refers to the rule in the *Middlesworth* case and says, "This has ever since been the ruling of this court." If appellee's first and second instructions are good then all the others are. The first one is a substantial copy of an instruction approved by this court in *C. & A. R. R. Co. v. Bock*, 17 Ill. App. 17. The second is similar to one fully discussed and approved in *T. P. & W. R. R. Co. v. Bray*, 57 Ill. 515. See also *T. P. & W. R. W. Co. v. Ingraham*, 58 Ill. 120; *C. & N. W. R. R. Co. v. Barrie*, 55 Ill. 227; *C. & A. R. R. Co. v. Kellam*, 92 Ill. 247; *W., St. L. & P. R. W. Co. v. Krough*, 13 Ill. App. 434.

As to the evidence excepted to, the case of *C. & A. R. R. Co. v. Bock*, 17 Ill. App. 17, decided by this court, is directly in point.

CONGER, J. Appellant was, on the 24th day of July, 1888, operating its railroad between the stations Greenview and Mason City, in Mason county, Illinois. Its track was fenced as required by law. About three miles north of Greenview the road ran through pasture lands on which appellee and others had a number of horses pasturing. Some person going through this pasture and over the railroad by way of a farm crossing early in the morning of the above date, left the gate on the west side of the railroad open, and from twelve to twenty of these horses strayed onto the right of way and the north-bound passenger train ran upon and killed or injured eleven of the number, among which there was a pony, a mare and a colt belonging to appellee. The accident occurred about seven o'clock in the morning.

The track was straight, and appellee contended that the

servants of appellant saw, or could by the exercise of reasonable care have seen the horses in time to stop the train and avoid the injury. Appellant denied that the horses were seen in time to avoid the injury, and contended that they suddenly came upon the track, unexpectedly to the engineer, and that so soon as they were observed the engineer did everything in his power to avoid the injury. Appellant introduced evidence to show that the conformation of the ground, vegetation, fences, telegraph poles and hedges were so situated that the horses were obscured from the engineer until they came upon the track. Appellee claimed that the right of way was clear and level, and that there were no obstructions, and that appellant's servants were negligent in not discovering the horses in time to prevent injury to them.

It was stipulated on the trial that the horses of appellee were upon the track of defendant without its fault or permission. Appellee secured a judgment below for \$205.

The first objection relied upon by appellant is that the court below erred in admitting incompetent evidence for appellee.

This objection is based upon questions asked of witnesses as to what they saw upon and along the sides of the track at the place of the accident in the nature of obstructions, the character, appearance and locality of the animals' tracks, and the judgment of the witnesses based upon what they observed, as to the place where the animals came upon the track, together with their direction and speed. A sample of these questions and answers as given by appellee when upon the stand, we quote from appellant's briefs.

"Q. State whether or not, at or near the bridge and looking north to where the horses were killed, there was anything to obstruct the view, so that you could not see horses on the track?

"(Objected to by defendant as incompetent; overruled, and defendant excepted.)

"A. Nothing in the way, that I seen. The hedge had been cut back probably a year and had grown up again seven or eight feet high and about four feet thick.

"Q. Were the hedges so located as to obstruct the view of a person coming from the south?

"(Objected to by defendant as asking for the conclusion of witness, and incompetent; overruled; defendant excepts.)

"A. No; the right of way was fifty feet wide. I went there later in the season, in October, with Ellsberry, my son, Linn, Melton and Scoville. On that occasion my son went south from the bridge about a quarter of a mile on the track and sat down on the ties.

"(Defendant objects to the occurrences in October, after the horses were killed; objection overruled, and defendant excepts.)

"I saw him sit down on the ties. I got down in the ditch, on the east side of the highest grade, probably a hundred feet south of the end of the hedge, on the east side of the track. I think the ditch was six feet deep there.

"Q. What did you do when you got down to the bottom of the ditch?

"(Question objected to by counsel for defendant as incompetent; overruled, and defendant excepted.)

"A. I laid down on my side.

"Q. State whether or not you looked south.

"(Objected to by defendant as incompetent; overruled, and defendant excepted.)

"A. I did.

"Q. What for?

"(Objected to by counsel for defendant as incompetent; overruled, and exception.)

"A. To see my son; I saw him; he was sitting between the rails, on the ties. Gus Melton went down with me.

"Q. From the bridge, looking north, you may state to the jury whether or not there was anything to obstruct the view between the bridge and the point where the horses were killed.

"(Objected to as incompetent and asking for conclusions; objection overruled, and defendant excepts.)

"A. There wasn't anything. On the 25th of July I examined to see if the horses had come on the track at any point. I found where they started to run out of the ditch, and where they got on the track. I saw their tracks as they went on,

about a hundred and ten feet south of the hedge. I found tracks coming up from both sides onto the track. The track on the east side looked as if it might have been eight or nine horses.

"Q. If you could tell, from the appearance of the tracks and the indications you saw there, what the gait of the horses was, in coming up on the track, state what, in your judgment, the gait of the horses was?

"(Objected to by defendant as asking for an opinion; overruled, and defendant excepted.)

"A. It must have been running.

"Q. What do you judge that from?

"(Same objection; same ruling, and exception.)

"A. From the shape of the tracks; I saw marks of their hoofs on the ties, going north. The track was ballasted with slag. I found my horse's shoe on the track, and some pieces of hoof, seven or eight in all, about the size of my finger. Some were an inch and some a half inch wide, that had bursted off the sides of hoof. Afterward found slag imbedded in the frog of the horses' feet.

"Q. From the indications you have described, you may state to the jury what, in your judgment, was the gait the horses were going at—going north on the track?

"(Objected to by defendant as incompetent, and asking for conclusions; overruled, and defendant excepts.)

"A. They were running."

We do not think appellant's objection to these questions is well taken. For a witness to state that by actual trial he could stand at one point and see to another, is not expressing an opinion, but is a statement of the fact that there was no obstruction to the sight between such points. In no other way could he so clearly give the jury the facts, for, after describing the ground, the situation of surroundings and intervening objects, the jury would be unable to say whether such obstructions did or did not interfere with the view of the witness. In reference to the experiments made by the witness of getting into the ditch at the side of the track and seeing his son sitting down upon the ties at another point, we can see no

objection. It was done to show how the depth of the ditch, the height of grass and weeds, at the distance the two were from each other, would obstruct the vision. Such evidence may not have had much weight with the jury, because the witness in making his observations was not in the same position as the engineer and fireman upon the engine, and because the latter were moving rapidly, with the cares and responsibilities of their station needing their attention, while the witness would be at rest and giving his mind entirely to making these observations; but these circumstances would only bear upon the weight and value of such evidence, and not upon its competency. The statement of the witness that, in his judgment, determining from the appearance of the tracks and the indications that he saw, the animals at a given point were running, was, we think, proper. If one can determine from an inspection of the tracks the gait of the animal making them, we apprehend it would be difficult, if not impossible, to so describe to a jury the peculiarities of the track as to enable them to see them with the eyes of the witness.

It is not unusual for a witness to state that one whom he observed had a pleasant or an angry look upon his countenance. He reaches this conclusion, and may state it to a jury as a fact, and yet, if asked to describe to them the appearance in detail of the face of the person so observed, in order that the jury might determine whether he was right in his conclusion, he could do no more than to reproduce for their benefit the impression made at the time upon his own mind.

The court gave the following instruction :

"The jury are instructed that it is the duty of the engineer and fireman to use ordinary care in looking ahead, when running the railroad train, for the purpose of detecting and discovering anything on the track, to prevent injury and accident; and if the jury believe from a preponderance of the evidence such servants failed to use such care, and by reason thereof they failed to discover the horses in time to prevent injury, and thereby the horses were killed, then the plaintiff, if he used ordinary care in keeping the horses off the track, should recover. This question of negligence should be considered

with reference to all the other duties of the fireman and engineer, and also the fact that the horses might not reasonably be expected to be on the track, and also all the other circumstances in the case, and the servants of the defendant be held, under all the circumstances, to use only such care as a reasonably prudent person would have done under the circumstances."

It is insisted that this and other instructions of the same import are in conflict with the doctrine of the Supreme Court as announced in *T. W. & W. Ry. Co. v. Barton*, 71 Ill. 640, and of this court in the *Hill* case, 24 Ill. App. 619. When the facts of those cases and the questions passed upon are noticed, we think the objection made is not tenable.

In the *Barlow* case, no claim was made that the engineer and fireman had failed in their duty in keeping a proper lookout. The court in that case say:

"About 100 feet from the highway, the engineer, who was looking ahead for a signal to stop at the station, saw two cows approaching the track, in the highway; first saw their heads as they came within range of the headlight of the engine, just as they were coming upon the crossing. * * * The night was dark and the cow could not be seen from the engine until she came within the range of the headlight;" and from that time the court say the engineer did all that he could to prevent injury to the animal, and therefore conclude the company was not liable. It may well be supposed that if there had been a question in that case as to whether the engineer and fireman had neglected to use ordinary care in looking ahead, the holding of the court upon such question would have been in accordance with the instruction complained of in this case.

In the *Hill* case, *supra*, the reasons given for sustaining the judgment of the court below were that the engineer after he discovered the animal failed to exercise proper care and prudence, so that in that case the question did not arise what measure of care the engineer and fireman of a train should exercise in looking ahead for obstructions upon the track.

We think the instruction given is the law. It requires the

engineer and fireman to use ordinary care in looking ahead when running a railroad train, for the purpose of detecting and discovering anything on the track, and this duty is to be considered in reference to all their other duties.

If the engineer and fireman of appellant fell short of this reasonable and proper measure of their duty, we think it was negligence on their part.

Finding no substantial error in the record, the judgment of the court below will be affirmed.

Judgment affirmed.

REBECCA MCGARVEY

V.

HARVEY DARNALL ET AL.

Administration—Property in Several States—Administrators—Judgment against One of Several—Executor—Heir at Law—Evidence.

A judgment against an administrator appointed in one State is not evidence of an indebtedness as against an administrator of the same estate appointed in another State, nor as against the executor or heir at law of the same decedent when sued in another State from that in which the judgment was rendered.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Mr. C. A. KEYES, for appellant.

The judgment of appellant is *prima facie* evidence against the heirs at law of Amelia Darnall in this proceeding. *Rosenthal v. Renick*, 44 Ill. 207; *Stone v. Wood*, 16 Ill. 177; *Hopkins v. McClain*, 19 Ill. 113; *Moline Co. v. Webster*, 26 Ill. 231; *Sutherland v. Harrison*, 86 Ill. 363; *Goepfner v. Leitzelmann*, 98 Ill. 409.

McGarvey v. Darnall.

Mr. ROBERT MATHENY, for appellees.

PLEASANTS, P. J. This was a petition filed August 21, 1883, by Harvey Darnall and Agnes Darnall against appellant and the other heirs of Amelia Darnall, who died on the 18th of February, 1883, intestate, in Henry county, Iowa, where she then resided, for the partition of certain lands in Sangamon county, Illinois, of which she was seized at the time of her death.

Appellant answered and also filed a cross-bill averring that letters of administration were duly granted upon the estate of said Amelia Darnall by the proper court in Henry county, Iowa; that on September 18, 1883, she filed in that court a claim against the estate, and obtained judgment thereon for \$2,545 and costs, which judgment, on appeal by the administrator, was affirmed by the Supreme Court of that State, and is in full force and wholly unpaid; that said decedent left no personal property whatever, nor any real estate except the lands described in the petition; and praying that if said lands can not be partitioned and have to be sold, the court decree the payment, out of the proceeds, of her said judgment with interest and costs.

It was shown that Amelia Darnall left no personal estate in Iowa except \$400 in worthless promissory notes, nor any in Illinois except one bed and one bureau, the value of which does not appear; that letters of administration were granted to the petitioner, Harvey Darnall, by the County Court of said Sangamon County, but not until the 11th of November, 1884; that no claim has been filed in said court nor presented to the administrator here, and that appellant is the only claimant, as creditor, against the said estate.

On final hearing a decree was made dismissing the cross-bill and ordering partition as prayed in the petition.

Counsel have discussed at considerable length the questions of jurisdiction in the Circuit Court over the matter of this claim, in this proceeding, and of the application and effect of the statute barring claims not presented within two years after administration granted, except as against assets thereafter discovered.

We have thought it unnecessary to decide these questions, because upon the assumption that the court had jurisdiction and that the claim was not barred we are of opinion that the only evidence offered to prove it was, in this case, incompetent. That was a copy of the record of the judgment against the administrator in Iowa, duly certified under the Act of Congress; which was objected to and excluded.

It seems to be settled by the authorities that a judgment against an administrator appointed in one State is not evidence of an indebtedness as against an administrator of the same estate appointed in another, for the reason that the parties are different and there is no privity between them.

In respect of their appointments, powers, estates, duties and liabilities, they are strangers—as much so as administrators of the estates of different decedents. *Judy v. Kelly*, 11 Ill. 211; *Rosenthal v. Renick*, 44 Ill. 202; *Stacey v. Thrasher*, 6 Howard U. S. 44; *McLean v. Meek*, 18 Id. 16. For the same reason it is not evidence against the executor or heir at law sued in another State. It can affect no property of the decedent in another State, howsoever or by whomsoever held, either directly or indirectly, as evidence of a claim or cause of action. *Low v. Bartlett*, 8 Allen, 259.

Decree affirmed.

OHIO, INDIANA & WESTERN RAILWAY COMPANY

v.

EDA B. DOOLEY.

Railroads—Flowage—Insufficiency of Culverts—Right of Way.

1. In an action against a railroad company to recover for the overflow of plaintiff's lands, alleged to be due to insufficient culverts through defendant's embankment, it is *held*: That the mere ownership of the right of way by the defendant constituted no defense; that the right to build and operate the road carried with it the duty skillfully to construct; and that for injury caused by faulty construction the remedy is clear and may be applied as often as injury occurs.

O., I. & W. R. R. Co. v. Dooley.

2. In the case presented, this court holds that the admission of evidence as to the increased flow of water from tile drainage, for which defendant was not bound to provide outlet, was not reversible error, the jury having been clearly and correctly instructed, and the special findings showing that they followed the instructions given.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of McLean County; the Hon. O. T. REEVES, Judge, presiding.

Messrs. O. W. FAIRBANK and FRANK Y. HAMILTON, for appellant.

In the condemnation of land for [railway purposes, the assessment made embraces damages of every kind naturally consequent to the use for which the land is taken, unless negligence in the construction is shown. *Furniss v. H. R. V. R. Co.*, 5 Sanford (N. Y.), 551; *C. R. I. & P. R. R. Co. v. Carey*, 90 Ill. 514; *City of Chicago v. Rumsey*, 87 Ill. 348; *Rigney v. City of Chicago*, 102 Ill. 64, and cases therein cited; *Waterman v. O. & P. R. R. Co.*, 30 Vt. 610; *Perley v. B. C. & M. R. R. Co.*, 57 N. H. 212.

There is no liability for not constructing culverts so as to pass extraordinary floods. *P., Ft. W. & C. R. R. Co. v. Gilleland*, 56 Penn. St. 445; *B. & O. R. R. Co. v. Sulp. Sp. School*, 96 Penn. St. 65; *H. & G. N. R. R. Co. v. Parker*, 50 Tex. 330; *Ellet v. St. L., K. C. & N. Ry. Co.*, 76 Mo. 518; *Ill. Cent. R. R. Co. v. Bethel*, 11 Ill. App. 17, and cases therein cited; *Freeland v. Pa. R. R. Co.*, 66 Pa. St. 91.

Defendant is not liable for damages without notice of insufficient openings. *Union Trust Co. v. Cuppy*, 26 Kan. 754; *Bonner v. Welborn*, 7 Geo. 314; *Wayland v. St. L., K. C. & N. Ry. Co.*, 75 Mo. 548.

After culvert had been constructed some years without complaint, and an injury having subsequently arisen, it was held that the action would not lie. *Colley v. L. & N. W. Ry. Co.*, 31 Eng. Rep. 691.

Damages for overflow of land caused by acts of a former company owning a railroad can not be recovered. *Wayland v. St. L., K. C. & N. Ry. Co.*, *supra*.

Where an injury is caused to real estate by a cause of a permanent character, the grantee of the owner of the property can not maintain an action for the continuance of the cause of the injury. *C. & A. R. R. Co. v. Maher*, 91 Ill. 312; *T. W. & W. Ry. Co. v. Morgan*, 72 Ill. 155; *C. & E. I. R. R. Co. v. Loeb*, 118 Ill. 203; *W., St. L. & P. Ry. Co. v. McDougall*, 118 Ill. 229, and cases therein cited.

In *Wagner v. L. I. R. R. Co.*, 2 Hun (N. Y.), 633, it was held that damages could not be recovered for the accumulation of surface water.

A railroad is not bound to furnish an outlet for tile drains, nor for the excessive amount of water accumulated thereby. *Starr & C. Ill. Stats., Chap. 42, Drainage.*

Mr. JAMES S. EWING, for appellee.

A railroad company has no right, by any embankment or other artificial means, to obstruct the flow of the surface water and thereby force it in increased quantities upon the lands of another; and if it does so, it is liable for any injury the owner of the land may sustain thereby. 2 *Hilliard on Torts*, 378; *Toledo, W. & W. R. Co. v. Morrison*, 71 Ill. 616; *Chicago, R. I. & P. R. Co. v. Moffit*, 75 Ill. 524.

Every continuance of a nuisance is a fresh one. 3 *Blackstone's Com.*, 220; *Sedgwick on Measure of Damages*, 144; 1 *Hilliard on Torts*, 65.

Defendant having made use of the grade with its insufficient waterways during the year in question, and having repaired the same, was not entitled to notice of their insufficiency or the injurious consequences. *Groff v. Ankenbrandt*, 19 Ill. App. 150; *McGowan v. Mo. Pacific R. Co.*, 23 Mo. App. 203.

It was lawful for plaintiff to drain her land with tile to the points in the natural depressions at the line of the right of way on north side. *Starr & C. Ill. Stats., Chap. 42, Secs. 177 and 186.*

WALL, J. This was an action on the case by appellee against the appellant to recover damages for overflowing the land of appellee.

The first count of the declaration alleged that appellant did not construct and maintain sufficient openings through its embankment to permit the water to flow from the land of appellee, whereby the land was overflowed and rendered unfit for cultivation.

The second count averred the same facts as to the obstruction, with the addition that because of the insufficient openings the water was backed up and discharged with undue violence on that part of the land below the railroad, causing portions of the soil to be washed away, etc.

The plea was not guilty. A trial by jury resulted in a verdict for plaintiff of \$50. By their special findings it appeared that the jury disregarded all claims under the second count and therefore the objection that the court refused an instruction with regard to that part of the plaintiff's demand and that the 7th, 8th and 9th special interrogatories were not submitted to the jury will require no consideration.

No objections are urged to the modification of the defendant's instructions. It is urged, however, that there was error in those given for plaintiff because they proceed upon the theory that the railroad had constructed and maintained water ways insufficient to carry off the surface water, and it seems to be argued that as it was admitted the railroad company owned the right of way, and had paid for it, therefore all damages growing out of the construction of the road had been included in the condemnation proceedings, and unless there had been changes in the structure causing additional damages the plaintiff could not complain. It did appear the appellant had been operating the road since January 25, 1888, and was the owner of the right of way and had paid therefor, but it did not appear whether this was through condemnation or by purchase nor from whom such right of way was acquired, nor did it appear that appellant had ever paid for the right to overflow the land of appellee by means of insufficient waterways, or that appellee or her grantors had ever been compensated in any way for prospective damages of that sort.

The mere owning of the right of way would confer no authority to inflict such an injury upon the adjoining land

owner without liability, nor would even a recovery in a former suit for damages not now claimed bar this action if the injury complained of was due to the negligent and improper construction of the road. The right to build and operate the road carries with it the duty to construct skillfully. For injury caused by faulty construction the remedy is clear and may be applied as often as injury occurs. *O. & M. Ry. Co. v. Wachter*, 123 Ill. 440; *C., B. & Q. R. R. Co. v. Schaffer*, 26 App. 280; *Id.*, 124 Ill. 112.

This objection to the plaintiff's instructions is untenable, and the cases cited in the brief in support of it are not in point as we understand them.

It is pressed with some force that the real cause of damage was that the tile drains of the plaintiffs produced an extra flow of water and that the real object of this suit was to hold defendant liable for not furnishing sufficient openings to let off such accumulations, and it is insisted the court erred in permitting evidence in regard to such tile drains.

It would have been quite difficult to place the situation fairly before the jury without more or less reference to the tile—and this came out somewhat in the evidence for defendant as well as for plaintiff—but the jury were very clearly and distinctly instructed that defendant was responsible only for obstructing the natural drainage of the land and was not required to provide any additional facilities on account of the artificial drainage by means of the tile of the plaintiff.

From the special findings it appears the jury were guided by these instructions and placed the damages on the ground of an obstruction to the natural drainage only. We think the objection urged in this regard is also untenable.

As to the chief question of fact and the amount of damages awarded there is no proper occasion for interference.

The evidence, though conflicting, is of such character as to support the verdict.

Perceiving no substantial error in the record we must affirm the judgment.

Judgment affirmed.

Mayer v. Oldham.

ANTON MAYER

V.

ORPY E. OLDHAM AND JOHN M. OLDHAM.

Mortgages—F. reclosure—Duress—Abuse of Criminal Process.

The arrest and detention of a party charged with a crime, without regard to his guilt or innocence, for the purpose of enforcing the settlement of a claim, without the intention of enforcing the criminal law, is an abuse of criminal process, and against public policy, and the party causing such arrest will not be permitted to enjoy the results obtained thereby.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Clark County; the Hon. J. W. WILKIN, Judge, presiding.

Mr. T. J. GOLDEN, for appellant.

It was ascertained, and Oldham admitted it to be true, and has at no time denied it, that Oldham embezzled about \$800 from appellant.

The appellant had the unquestioned right to the full restoration of the money that had been criminally taken from him. It is not pretended that he sought to recover any more. The thief was bound under every phase of the law to return his ill-gotten plunder and the owner was not restrained to any fastidious forms of etiquette in communicating and dealing with him about it.

There is not a particle of evidence in the record that an agreement not to prosecute for a felony was the consideration for appellees' undertaking. The indebtedness to appellant on account of actual money taken was the consideration, and not a cent was added for any other purpose, although it would have been perfectly proper to have made appellees pay the expenses incident to the transaction. *Ford v. Cratty*, 52 Ill. 313.

Although the preponderance of the evidence failed to show that threats of imprisonment were made, yet, if made as contended, duress would not be made out.

"Where a person has committed a crime, a threat to have him arrested and imprisoned being only a threat of lawful arrest, will not constitute duress, in any such sense as will discharge him from liability upon a contract to indemnify the person injured by the commission of the offense." *Compton v. Bunker Hill Bank*, 96 Ill. 301.

"But where the imprisonment is lawful, the party alleging the duress must show it is made to operate upon and influence his mind by constraint, to assent to, and do acts contrary to right and justice. 3 Bacon's Abridg. title 'Duress,' 252-5; 4 Harrington, 311. And this may be done by false, malicious and groundless demand, or charge of crime, for which the party may be arrested and forced to execute the instrument to procure his release, as in the case of *Watkins v. Baird*, 6 Mass. 506." *Taylor v. Cottrell*, 16 Ill. 94; *Schommer v. Farwell*, 56 Ill. 542.

Mr. S. S. WHITEHEAD, for appellees.

CONGER, J. This was a bill to foreclose a mortgage executed by appellee and her husband to appellant. Several defenses were set up by appellees, only one of which it is necessary to notice and that was duress.

Upon the hearing the Circuit Court dismissed the bill and appellant brings the record to this court for review.

The principal facts appearing from the evidence are that the note which the mortgage secured was for the sum of \$904.50 and was executed September 20, 1884, at Terre Haute, Indiana, and made payable at a bank in Marshall, Clark county, Illinois, where the land included in the mortgage was situate. John M. Oldham had been at work for appellant driving a beer wagon and, as claimed by the latter, Oldham, during the months of July and September, 1884, embezzled about \$810, and upon failure to pay this money was discharged from appellant's employment.

Mayer v. Oldham.

In the evening of September 23d, J. D. Early, a police officer of Terre Haute, about half past six o'clock next morning on the back stairway of his residence, and told him Mr. Vandever, who was the chief of police of the city, wanted to see him at police headquarters, and Oldham went to there with him. This is the way the circumstance is stated by Early, while Mrs. Oldham says at about eight or nine o'clock Saturday night the policeman came into their home, and took her husband out in the hall, when she followed and asked what was wanted, and that Early replied that he did not know, but that the chief of police wanted Oldham at police headquarters.

Shortly afterward Mrs. Oldham went to police headquarters to ascertain what the trouble was, when she learned that her husband was held upon this charge of embezzlement and propositions were made by appellant and his attorney, Mr. Hendrich, to settle the matter by Mrs. Oldham giving the note in question and securing it by a mortgage upon her land in Clark county, Illinois; appellant, Mayer, his attorney, Mr. Hendrich, and appellees, Oldham and his wife, then went to the latter's residence, accompanied by Early, the policeman, who went along as he says by instructions of Vandever, the chief of police, and who says he staid outside the door where he could see what became of Oldham, and remained there on guard until the matter was arranged, and Mayer and Hendrich came out of the house, when the latter told him that the matter was all straightened up and he could go home, which he did.

As to what took place at Oldham's house when the note and mortgage was executed, there is in the evidence a direct contradiction, Oldham and his wife testifying that both Mayer and his attorney, Hendrich, said if she did not sign the note and mortgage her husband would be taken to jail, and then sent to the penitentiary, but that if she would sign them, no one except the four present would ever know anything about the charge made against Oldham. That Mrs. Oldham was sick and frightened, and asked time to consider of the matter, and consult an attorney, which was refused by Mayer and his attorney, and that she finally signed the papers, as she says,

because she was frightened and thought if she did not they would send her husband to the penitentiary. These statements are denied by Mayer and Hendrich who say that they made no threats whatever.

While, therefore, it may not be satisfactorily established that the threats spoken of by appellees were made, a consideration of the circumstances under which the note and mortgage was executed by appellee, Mrs. Oldham, will show that it was induced by the unlawful imprisonment of her husband. The arrest and detention of Oldham was unlawful, without reference to the question of his guilt or innocence, because such arrest was used by Mayer and Hendrich, his attorney, for the sole purpose of enforcing a settlement of a claim, and with no purpose of enforcing the criminal law. This was an abuse and perversion of criminal process, against public policy, and no court will allow the results following from it to be enjoyed by him who so uses it. *Bane v. Detrick*, 52 Ill. 27; *Gorham v. Keys*, 127 Mass. 583.

To show the purpose of the arrest, it is only necessary to give a few extracts from the evidence of the actors in the proceeding.

Appellant, Mayer, says: "I had two talks with Oldham, and my bookkeeper talked with him; I had another talk with him on the evening he was arrested. Mr. Hendrich was my attorney in the matter; he sent for Vandever and told him about it; Vandever was chief of police; we sent for him to arrest Oldham; I told him to bring Oldham up to me; they had no orders to take him to police headquarters; I had him in the custody of the police to get a settlement out of him."

Vandever, chief of police, says: "We had no papers for taking him (Oldham); he was in custody on instructions from Mr. Mayer; we would not have permitted him to go if he had wanted to; Mayer instructed me to find Oldham and then he thought he (Oldham) would fix the matter all right. The understanding was, that they were to settle the trouble and Oldham was then to be released, and not until then."

Mr. Hendrich, the attorney, says: "He (Oldham) was in charge of an officer all the evening. The object in having an

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officer was to keep him in sight, as we had difficulty in finding him."

Appellant, by his own showing, seems thus to have had the police force of the city so completely under his control that upon his declaration to the chief of that body that he desired one of his debtors arrested and held in custody until he should settle, it was done. No thought seems to have been entertained of carrying this alleged defaulter before any other tribunal than Mayer and his attorney; and when the arrest had accomplished its intended purpose, an order of discharge from Hendrich seems to have been accepted by all parties as a complete end of this novel transaction.

It can not be doubtful, we think, but that for the unlawful means thus employed the contract would not have been entered into; that there was unlawful imprisonment and duress because the criminal law was used for an unlawful purpose, and therefore the note and mortgage executed by Mrs. Oldham should not be held binding upon her.

The decree of the Circuit Court will be affirmed.

Decree affirmed.

THE CHICAGO & ALTON RAILROAD COMPANY

V.

EDWARD WOOLRIDGE.

Railroads—Personal Injuries—Right of Passengers on Depot Platform—Instructions—Evidence—Sufficiency of—Servants—Negligence of.

1. In an action by a party alleged to have been injured by the careless handling of a trunk by a baggageman upon a depot platform, where certain instructions did not pretend to determine the liability of appellant under the circumstances shown, but merely laid down the general principles of care required of appellant's servants, this court holds that the omission to state in such instructions that, in order to recover, the appellee must himself have been in the exercise of due care, was not erroneous.

2. It does not constitute negligence, as a matter of law, for a passenger waiting for a train at a depot to go upon the platform before it is necessary for him to board the same. He is not required to remain in the waiting room.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Macoupin County; the Hon. J. J. PHILLIPS, Judge, presiding.

Messrs. RINAKER & RINAKER, for appellant.

The third instruction is bad and should have been refused, because it does not inform the jury that the railroad company is only liable for the negligent acts of its servants, when such acts happen to injure persons who are themselves at the time in the exercise of due and ordinary care for their own personal safety. See *C. & N. R. E. Co. v. Carroll*, 12 Ill. App. 643; *Peoria P. U. Ry. Co. v. O'Brien*, 18 Ill. App. 28; *City of Peoria v. Simpson*, 110 Ill. 294.

When a person is at the depot of a railroad company, even with the intention of taking one of several trains expected to depart therefrom, when there is an unusual number of persons present expecting also to depart from such depot on such trains, and when trains with passengers are at the same time arriving, it is his duty to exercise a degree of care for his personal safety commensurate with the increased danger to which such circumstances and conditions give rise, and to neglect to do so is a failure to exercise due and ordinary care on his part. *Todd v. Old Colony R. R. Co.*, 3 Allen, 18; *Hickey v. Boston & Lowell R. R. Co.*, 14 Allen, 429; *Pittsburg R. R. v. McClurg*, 59 Pa. St. 294; *Indianapolis R. R. v. Rutherford*, 29 Ind. 82; *I. C. R. R. Co. v. Hall*, 72 Ill. 222; *Colorado Central R. R. Co. v. Holmes*, 5 Col. 197; *Cooley on Torts*, 674; *R. R. Co. v. Schwindling*, 8 Am. & Eng. Ry. Cases, 544.

Mr. R. B. SHIRLEY, for appellee.

CONGER, J. This was an action by appellee against appellant for injuries to his person caused, as stated in the first count of his declaration, by the negligence of appellant's servants in permitting a baggage truck used on the depot platform to be run and driven against its train of cars while the latter were in motion. Verdict and judgment for appellee for \$225.

C. & A. R. R. Co. v. Woolridge.

The main facts as stated on the trial by appellee were that he resided in Shipman, and on the evening of October 9, 1888, came to Carlinville to a political meeting, and about ten, that evening went to appellant's depot to return home. He says: "I reside in Shipman, Illinois, am thirty-three years old, a carpenter by trade; came to Carlinville on the evening of October the 9th, the day of the 'Fifer rally,' on the C. & A. train from the south; I went back to the C. & A. depot a short time before the lightning train came in from the south; my train going south, was on the side track; I went in the waiting room, stayed a little while, went down on the north end of the depot platform and came walking back just as the lightning came in; there was a crowd on the platform; as I walked up, the baggage man came rolling the truck down just as the train came in going north; same as the train; he got pretty close to me, and let the truck get into the train, and it struck me; I saw it as it struck the train; there was some baggage on the truck and he was rolling it right towards me; I was towards the building, and the people were giving the road for him; I was about twelve feet from the truck when it struck the train, northeast, next the house, and it was on the edge of the platform; don't know if Seaman was rolling the truck as the time it was struck; he had hold of the truck when it struck, rolling it along and it struck the car; it was a large baggage truck; I was knocked down, hurt on the leg; there were seven places showing where I was struck, and injuries show yet; I was helped into the depot waiting room and on the train and went to Shipman that night."

He had procured a ticket at Shipman for the round trip.

Appellant introduced evidence tending to show a different state of facts. The baggage master, Mr. Seaman, in reference to the accident says:

"I am the baggage master of the C. & A. R. R. at Carlinville, Ill., and have been for thirteen years last past; was on October 9th, last; I receive baggage, check it and put it on the cars; I wait until the train is in sight and then run truck up to where train stops for baggage, and usually, have time to go in and get the mail; I know where the train will stop; if

there is not time to get the mail I stay until train stops and put the baggage on.

"On the night of this accident I was on duty when the lightning came in, and had three pieces of baggage for Springfield, all checked; one was a boot and shoe trunk; I had them on the baggage truck south of the baggage room door at about 9 o'clock and until No. 3 had turned the corner, when I lit the gas at the baggage room door and then ran my baggage to where they usually stop; I pulled my baggage with my right hand and pushed the mail-cart with my left; I was at the north end of the truck with the mail cart at my left hand as I went up, pushing it; the effect of the way I was pulling it would be to run the rear end of the truck more towards the house than the train, because I was pulling it on one side.

"I stopped right opposite the office door and turned facing the building, holding the baggage truck with my right hand and my left hand a hold of the mail cart; didn't know but that they might shove it into the train; I didn't leave it at all; such a crowd there; the engine and mail car passed me all right, that is all that I remember.

"Just as I got on the truck to light the gas a man said he had a trunk he wanted checked, but I refused because I then did not have time; I didn't see him any more only as he came past me with the truck, the express truck; it came down from the north end same time train was coming in; came right down past my truck, past the north end of my truck, where I was standing still holding it; don't know what became of it; I was knocked down and didn't know where it was until after the train pulled out; up to the time that truck came past, nothing had happened to me; there was one trunk on it."

Other witnesses corroborate to some extent the statements of these two.

The theory of appellee is that the baggage master carelessly allowed one end of his truck to come in contact with the train, thereby throwing it forward and causing the injury to appellee; while appellant urges that the collision of the baggage truck with the train was caused, not by any fault or

negligence of the baggage master, but because a stranger ran the express truck, upon which was his trunk, through the crowd upon the platform and against the baggage truck.

This was a question of fact to be determined by the jury and we find nothing in the evidence to warrant us in saying they have found erroneously.

Objection is made that the court erred in refusing to submit a number of special interrogatories to be answered by the jury. We think no error was committed in this respect. All that were material or relevant were included in others that were given to the jury. The first and third instructions given appellee, and which are as follows, are claimed to be erroneous:

1. The court instructs the jury, that persons passing over or standing on a depot platform, in a proper manner and going there in a reasonable time for the purpose of taking a train, are not trespassers; and the servants of a railroad company, knowing the enhanced danger at the depot ground to persons constantly passing and repassing, are required to exercise a greater degree of caution for the preservation and safety of life, than at other places, where persons have no right to be and where the employes of the company need not expect to find them.

*3. The court instructs the jury, that a railroad company is liable for the negligent acts of its servant, if done in the course of his employment, even though the company did not authorize or know of such acts, or may have forbidden them; but the act must be done while the servant is engaged in the service he is employed to render, and must also be done in the course of that employment.

The principal criticism of these instructions seems to be that they fail to state that appellee must himself have been in the exercise of due and ordinary care at the time. We see no force in this objection. They do not pretend to determine the liability of appellant under the circumstances shown, but lay down the general principles of care and caution required of appellant's servants, in which we see no error.

The fourth refused instruction of appellant in substance

states that unless the plaintiff was at the place where he was injured, on the platform of defendant's depot, on business with the defendant, or was there to take a train about to depart from the station, or to meet some one expected to arrive on the train then arriving, or to see some one about to leave on that train, then, if there was a suitable waiting room, though he was expecting to depart on some other train for which he may have been waiting, he had no right to be at the place he was, when he was injured.

We do not think this states the law correctly. To hold that a passenger waiting at a railroad depot for his train to arrive must remain in the waiting room, and that if he goes out upon the platform at any time before it becomes necessary to board his train, he is guilty of such negligence as to prevent his recovery for an injury like the one in question, is not consistent with reason or common sense.

After a careful consideration of the whole case, we fail to see any good reason for interfering with the judgment of the Circuit Court and it will therefore be affirmed.

Judgment affirmed.

THE PEOPLE EX REL, ETC.,

V.

EDGAR W. FROST ET AL.

Schools—Mandamus—Demurrer—Text Books—Meetings—Regular or Special—Presumption—Notice.

1. Upon a petition for *mandamus* to compel school directors to permit the use of a certain series of text books, alleged to have been adopted by the board at a meeting at which all were present, it will be presumed that the meeting was either a regular or special one, and a demurrer setting forth that it is not alleged that the action taken was at a regular meeting, as required by statute, will be overruled.

2. Reasonable notice is necessary to require attendance of the directors at a special meeting of the board; but if all the members come together and by mutual agreement hold a meeting, any objection to the shortness, or absence, of notice is waived.

The People v. Frost.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Macoupin County; the Hon. J. J. PHILLIPS, Judge, presiding.

Messrs. RINAKEE & RINAKEE, for appellant.

Messrs. A. W. YANCEY and C. H. PATTON, for appellees.

Per Curiam. This was a petition for a writ of *mandamus* to compel the school directors of district No. 3, etc., etc., to permit the use of a certain series of text books which, it was alleged, had been adopted for use in the district within a period of four years before the filing of the petition. An answer was filed to the petition, and a demurrer being interposed to the answer, was carried back and sustained to the petition. The only question is as to the sufficiency of the petition. The objection taken in the Circuit Court and urged here is that it did not appear that the action of the directors in adopting said series of books was had at either a regular or a special meeting of the directors, and hence it did not appear that the action in question was official.

The language of the petition in this respect is as follows: "And your petitioner further states unto your honor, that on the 5th day of July, A. D. 1887, Edgar W. Frost, Abram D. Wood and Enoch M. Davis were, and now are, the acting school directors of district number three (3), township number seven (7), range eight (8), county of Macoupin and State of Illinois aforesaid, and on said date they, as such school directors, had the right and it was then and there their duty, as such directors, to direct what text books should be used in the school maintained and supported in said school district, and to strictly enforce uniformity of text books in said school.

"And your petitioners state that in the performance of their said duty as such school directors, they, the said 'school directors of district number three (3), township number seven (7), range eight (8), county of Macoupin and the State of Illi-

nois,' did, on the day last aforesaid, 'meet, and each of said school directors being then and there present did, by the unanimous action of said school directors,' adopt and direct to be used in the school of said school district, as text books to be used therein, certain text books known as the Standard Educational Series, and more particularly described as the * * *

"That in pursuance of said action of said directors the aforesaid books were introduced and used in the schools of said school district during the entire school year of the year A. D. 1887, and during the fall of the year 1888 until on or about the 6th day of December, A. D. 1888."

It is provided by statute, section 43, chapter 122, "That the board of directors shall hold regular meetings at such times as they may designate, and they may hold special meetings as occasion may require, at the call of the president or any two members, and no official business shall be transacted by the board except at a regular or a special meeting." The averments above quoted show that it was the duty of the directors to direct what books should be used; that in the performance of that duty they met, and, all being present, by unanimous action adopted and directed the use of the books in question, and that in pursuance of said action the books were introduced and used until on or about the 6th day of December, 1888. We are inclined to the view that the facts averred are sufficient to call for an answer. It appearing that the directors met in the performance of the duty in question, it will be presumed the meeting was either regular or special.

A regular meeting is one held at a designated time, but a special meeting may be held as occasion may require, on the call of the president or of two members. No business can be transacted unless at a regular or special meeting, but a special meeting may be held on call. It is not provided what notice shall be given in case of a special meeting, and the law would imply reasonable notice. Plainly the object of this provision is that every member may be notified when business will be in order. Reasonable notice would be necessary to require attendance at a special meeting, yet if the notice were unduly

Mashburn v. City of Bloomington.

short, and the members so notified chose to waive the objection, they might do so and the meeting would be good; and so if the members all came together with no previous intention of transacting business, it would be competent for them, upon suggestion and by mutual agreement, to proceed to hold a meeting and transact any official business they might deem necessary.

The object of the statute, being to provide notice, is attained if the directors meet and act, all being present. *Thomas v. Citizens Horse Railway Company*, 104 Ill. 462.

The judgment will be reversed and the case remanded.

Reversed and remanded.

ELIZA MASHBURN
v.
CITY OF BLOOMINGTON.

Municipal Corporation—Ordinance—Breach of—Disturbance of the Peace—Salvation Army—Evidence.

In a prosecution under a municipal ordinance touching conduct likely to frighten horses and embarrass the passage of vehicles, this court declines, in view of the evidence, to interfere with the judgment against the defendant.

[Opinion filed November 23, 1889.]

IN ERROR to the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

Messrs. TIPTON, BEAVER & PEIRCE, for plaintiff in error.

Mr. A. E. DeMANGE, for defendant in error.

Per Curiam. This was a prosecution by the city of Bloomington against appellant for a violation of the following ordinance of the city.

Sec. 4, Art. 3, Chap. 29: "Whoever shall, within the streets of said city, engage in any sport, amusement or exercise

likely to scare horses or embarrass the passage of vehicles, or whoever shall raise or fly any kite in any part of said city devoted to business, shall be fined not less than three nor more than twenty-five dollars." Appellant was found guilty and fined \$3 and the costs.

The evidence shows that appellant, as a member of the salvation army, took part in a meeting held on the square of the city and by beating a drum and carrying on the other exercises of the meeting caused such a crowd to gather around them as to largely prevent and embarrass the passage of vehicles along the street where they were, and also to frighten passing horses.

Counsel for appellant in their brief urge that this conviction is an invasion of the religious rights and liberties of the society to which she belongs, as well as her own, and the case of Trotter v. Chicago, decided by the Appellate Court of the First District in an opinion filed May 29, 1889, is cited.

We fail to see that any such question is involved, or that the Chicago case has any bearing upon this. In that case the question was as to the power of the city to forbid parades and processions without the permission of the chief of police; while in the present case the whole question is one of fact, whether appellant did, or did not frighten horses and embarrass the passage of vehicles in the public streets of the city. From the evidence, the jury have said she did, and we see no good reason for interfering with their conclusion.

It can not be insisted that any one has a right to do this, or that the city has not the right to prevent it.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

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71 177

J. H. RANDOLPH

V.

DREW INMAN.

Partnership—Dissolution of—Lapse of Time—Bill for Accounting—Limitations.

Randolph v. Inman.

Upon a bill filed to secure the settlement of a partnership, and for an accounting, although the same had been finally dissolved more than five years previous thereto, this court holds that the statute of limitations did not bar the relief asked, it appearing that within that time there had been consultations as to unsettled matters, requests and promises to account, and credits and charges by defendant, who was settling the partnership business against complainant on account of partnership claims collected and paid by him.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of DeWitt County; the
HON. GEORGE W. HERDMAN, Judge, presiding.

MESSRS. MOORE & WARNER and R. A. LEMON, for appellant.

MESSRS. FULLER & INGHAM, for appellee.

WALL, J. On the 12th of August, 1887, the appellant filed his bill in chancery against the appellee to dissolve and settle a matter of partnership then alleged to exist between the parties.

The answer denied that any partnership was in existence at the filing of the bill and alleged that the partnership relations had ceased by virtue of a dissolution thereof in March, 1879, and that whatever rights appellant had to a settlement in respect to said matters had accrued more than five years prior to the filing of the bill. The appellant by an amendment to the bill alleged that within five years before the filing of the bill the appellee had promised to settle up all copartnership business accruing prior to March 4, 1879, and to pay whatever balance might be found against him on such settlement. Upon a final hearing the court found as follows:

“That the copartnership of Randolph, Milmine & Inman, which existed from March 1, 1877, to March 1, 1878, under the name and style of Milmine & Inman, was dissolved February 28, 1878; that the copartnership entered into between J. H. Randolph and Drew Inman, March 1, 1878, continued in existence until March 4, 1879, at which time it was dis-

solved, and that since March 4, A. D. 1879, John H. Randolph and Drew Inman have not been in partnership in any way whatever.

"That the statute of limitations was well pleaded by the respondent in bar of the right of complainant to file a bill asking and praying for an accounting and settlement of the affairs of the two copartnerships aforesaid." Thereupon it was decreed that the bill be dismissed at the cost of the complainant. From this decree an appeal is prosecuted to this court.

Upon a careful examination of the evidence we are entirely satisfied with the finding that the partnership relations between the parties were finally dissolved on the 4th of March, 1879, and to that extent the decree will be affirmed. The only question is whether the court was warranted in refusing relief on the ground of *laches* in filing the bill. It is true that more than five years had elapsed since the parties had dissolved the partnership, and that courts of equity will generally consider such a delay, when unaccounted for, as a sufficient reason for denying relief. It appears; however, that when the partnership was dissolved there were many unsettled matters which the appellee undertook to adjust, involving the collection of partnership assets and the payment of partnership debts; that the assets had not all been collected when the bill was filed; that appellee had from collections and his own funds paid all the firm debts except the amount due John Warner & Co., which had been paid after being reduced to judgment by appellant but a short time before the filing of the bill, and that in the accounts kept by the appellee he had given credit to appellant in respect to the collection of assets and had made charges against him within five years. It also appears that appellee frequently, within five years, recognized the unsettled condition of these accounts and had urged the appellant to come to an adjustment of the same, averring readiness to abide by the result. Some of these offers were in the form of written communications dated at different times, the last one appearing in the record bearing date April 1, 1887, in which he says, among other things: "We have a basis for business, and according to that

Randolph v. Inman.

basis you and I, of right, must settle. This will determine our individual responsibility. I think you liable for the Warner notes, and in addition thereto, indebted somewhat to me; but as to this, a settlement alone will determine. I am ready to meet you at any time for settlement; further than this I can not propose." The present suit was brought within less than six months after this letter was written.

Appellee testified that he had been ready and willing all the time to settle, and had often stated so to appellant. With what grace can he now set up the statute of limitations as a defense? In 2 Lindley on Partnership, 967, it is said: "With reference to acknowledgments, it was held in a partnership case, where no account had been come to for six years, that a signed acknowledgment of a liability to account in respect to matters more than six years old, was sufficient to justify a decree for an account in respect to them, although the acknowledgment did not contain an admission that anything was due, nor any express promise to pay what might be found due on taking of the account." See also Kane v. Bloodgood, 7 Johns. Ch. 134; Prann v. Sympson, Kay's Ch. Rep. 678; Skeel v. Lindsey, 2 Ex. D. 314.

In view of the repeated statements of the appellee that he desired a settlement, admitting thereby that there was something to be settled, that he had credited appellant with respect to partnership matters within five years, and that in regard to at least one item of copartnership assets, the Emerick judgment, the parties had conferred together within that time, the suggested defense ought not to prevail. Although it had been more than five years since the partnership ceased, yet by reason of the matters referred to, the process of winding up and liquidating the partnership affairs had never fully terminated, though it is probable nothing more will be realized from the assets of the firm. By these matters, and the occasional conferences between the parties, this process had been kept in *esse*. It would be inequitable to hold, under the circumstances, that the delay in filing the bill ought to bar an accounting.

We therefore consider the decree erroneous, in so far as it

denies relief on this ground, and it is reversed, with instructions to proceed to an adjustment and settlement of the right of the parties in reference to the partnership relations which terminated on the 4th of March, A. D. 1879.

Decree affirmed in part; reversed in part; remanded with instructions.

S. G. CASH ET AL.

V.

THE PEOPLE, FOR USE OF, ETC.

Principal and Surety—Constables—Action on Bond—Illegal Acts of Principal—Liability of Surety.

The sureties on the official bond of a constable are liable for illegal acts on his part while engaged in making an arrest.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of Coles County; the Hon. J. F. HUGHES, Judge, presiding.

Mr. F. K. DUNN, for appellants.

The declaration does not state a cause of action entitling plaintiff to recover against the constable and his sureties on his official bond. The assault is charged to have been unnecessary and wilful and not in the execution of process. Where a sheriff or constable, having a writ directing him to take the property of one person, takes the property of another, it has been decided that such a seizure was not a breach of the condition of a sheriff's official bond and did not make his sureties liable. *State v. Conover*, 4 Dutch. 224; *State v. Long*, 8 Ired. L. 415; *State v. Brown*, 11 Ired. L. 141; *Gerber v. Ackley*, 32 Wis. 233.

In the Appellate Court of the second district it has been held otherwise on the weight of authority, and the Appellate

Cash v. The People.

Court of the first district, while not deciding the question, inclined to that view, and the Supreme Court of the United States held that the preponderance of authority was in favor of the liability of the sureties. *Horan v. The People*, 10 Ill. App. 21; *Walsh v. The People*, 6 Ill. App. 204; *Lammon v. Feusier*, 111 U. S. 17.

But those decisions were all made in cases where the officer actually had process in his hands, by virtue of which, acting in his ministerial capacity, he claimed to do the acts complained of. But in this case it is not charged that the officer had any writ, but simply that, having arrested Gwinn, whether with or without authority is not alleged, upon a charge of violating a village ordinance, he wilfully assaulted him. The case is like *Walsh v. The People*, 6 Ill. App. 204, and, so far as appears, the act was a mere private trespass, for which his sureties on his official bond can not be held liable. See *Commonwealth v. Co'e*, 7 B. Mon. 250; *Turner v. Collier*, 4 Heisk. 89; *South v. Maryland*, 59 U. S. 396.

Messrs. CRAIG & CRAIG, for appellees.

CONGER, J. This was an action of debt brought upon the bond of appellant, Cash, who was village constable of the village of Oakland. The declaration alleged that Cash, as such village constable, arrested appellee Gwinn for violating one of the village ordinances, and that, instead of taking him to the place of trial, unnecessarily, brutally and wilfully assaulted and beat him.

The pleas were, first, *non est factum*; second, denying the assault; third, alleges that at the time when, etc., the said William F. Gwinn was found intoxicated in the public square of the village of Oakland, disturbing the peace of the public and the peace and quiet of the neighborhood by loud and unusual noises and tumultuous and offensive carriage, and the defendant Cash, who then and there had view of said offense, then gently laid hands on said Gwinn and took him into custody, using only necessary force to take and detain him, and doing no unnecessary damage, and because it was late at night

and an unreasonable hour to carry the said Gwinn before a magistrate, said Cash necessarily imprisoned him in the village prison for a time, using only necessary force and doing no unnecessary damage, which are the same trespasses complained of. Appellee recovered a verdict and judgment for \$275.

The first objection of appellant is that the declaration does not state a cause of action, entitling appellee to recover from the sureties upon the official bond of appellant, for the reason, as stated by counsel, that "the assault is charged to have been unnecessary and wilful, and not in the execution of process."

We do not think the objection is well taken because appellant was performing an official act in making the arrest, and if in so doing he acts illegally and wrongfully his sureties are liable. Besides, the third plea expressly sets up the arrest and that no more force was used than necessary, and this seemed to have been the real question at issue before the jury. This being a question of fact, we are inclined to think the jury were warranted by the evidence in finding that appellant did unnecessarily, brutally and wilfully assault and beat appellee.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

E. S. FOWLER

v.

S. H. RICHARDSON.

Replevin—Written Contract—Parol Evidence—Judgment—Form of.

1. Evidence touching a parol contract is inadmissible, when the effect thereof would be to vary one in writing between the same parties.

2. Where, in an action of replevin, the trial court instructed the jury to find as in case of non-suit, which was accordingly done, and the motion for a new trial being overruled, "it was ordered that the defendant recover of the plaintiff possession of the property, with one cent damages and costs, with execution therefor, and that a writ of *retorno habendo* should issue therein," the judgment was correct in substance and sufficient in form.

[Opinion filed November 23, 1889.]

Fowler v. Richardson.

APPEAL from the Circuit Court of Sangamon County; the Hon. J. A. CREIGHTON, Judge, presiding.

MESSRS. GROSS & BROADWELL and CONNELLY & MATHER, for appellant.

MESSRS. PATTON & HAMILTON and W. F. HERNDON, for appellee.

WALL, J. This was an action of replevin by appellant against appellee, for two barrels of linseed oil, one barrel mineral paint and a quantity of white lead in oil, brought before a justice of the peace, and appealed to the Circuit Court. The case coming on to be tried by jury, E. S. Fowler, plaintiff, testifies: "I am the plaintiff in this suit; I made a contract on the 10th day of May, with defendant, to paint my house. I have it here in writing. He came to my house and offered to do it for \$100. A contract was entered into at that time; it was in writing. Here is the writing. I wrote it, and the paper has been in my possession since it was signed. Richardson said if I would advance him \$70 to buy the paint he would do the job." Paper is read to the jury as follows:

"May 10, 1888.

"Received of Dr. E. S. Fowler seventy dollars, on contract to paint the roof of his house and barn two coats, and all new wood work outside three coats, which I agree to do for one hundred dollars, balance to be paid on completion of work, and any paint remaining to be delivered to Dr. Fowler.

"S. H. RICHARDSON."

Whereupon plaintiff offered to prove as follows:

"That a parol contract was made between plaintiff and defendant on May 10, 1888, for the painting of plaintiff's house and barn, and that plaintiff by that contract advanced \$70 to the defendant, who, by the contract, was to use this money in buying the paint and oil to be used in painting the house, and was to place the oil and paint in the plaintiff's barn, mix it there, and leave there all the paint and oil that should remain

after the painting was completed, and that after this contract was agreed on the plaintiff paid the \$70 to the defendant and took from him the writing to evidence that the \$70 were used by defendant in buying the paint and oil named in the writ of replevin in this case, and that defendant refused to deliver it at the barn of plaintiff, and refused to surrender it to plaintiff on demand, or to do the work." And the court refused to allow said proposed evidence to be given to the jury, and plaintiff excepted to the ruling of the court rejecting said evidence. And thereupon the court instructed the jury to render a verdict as in case of non-suit, which was done.

The plaintiff, to recover, was required to prove that he was the owner, or lawfully entitled to the possession of the property. The written paper was evidence of a contract to paint the house and barn for \$100, upon which contract \$70 was advanced, and that whatever paint remained was to be delivered to the plaintiff. The offered oral evidence was for the purpose of showing that \$70 of the money should be appropriated to the purchase of paint, and that therefore the defendant should have but \$30 for his work. To this extent it tended to vary the writing which shows a contract for \$100 for the whole job, work and material considered. By the writing, if the defendant was able to provide the necessary material for less than \$70, he would have more than \$30 for his work.

The oral evidence offered did not, in terms, show that the paint in suit was actually bought with the money advanced, but if it is to be inferred that such was the fact from what was offered, it would not follow that the plaintiff was entitled to recover it, unless the effect of the proof would be to show that the paint, when so bought, was to belong to the plaintiff or to be placed in his possession. It is by no means clear, if the facts offered to be proved were true, that the plaintiff could successfully assert such claim; but if such a construction could fairly be placed upon the offered proof, then the effect would be to vary materially the written contract, under which the defendant would be entitled to own and control all unused material until the completion of the work, and then *any paint remaining was to be delivered to the plaintiff*. It is well set-

held that the familiar rule which prohibits the variation or contradiction of a written instrument by parol contemporaneous evidence is not violated by parol proof of matters not embraced in the writing, and not inconsistent with it. It is not infrequent that a contract is put in writing in part only, the residue being unnoticed, and in such cases the unwritten part may be proved by parol or verbal evidence. We are of opinion, however, that this is not such a case, and that the real effect of the proposed proof is to vary what is written.

The court properly rejected the evidence, and as the plaintiff did not propose to make further proof, it was proper to instruct the jury to find the issues for the defendant.

Objection is taken to the form of the judgment. The bill of exceptions states that "the court instructed the jury to find as in case of a non-suit, which was accordingly done." The verdict is not set out in the bill, though it appears in full in the order of court showing the trial.

The motion for new trial being overruled, it was ordered that the defendant recover of the plaintiff possession of the property, with one cent damages and costs, with execution therefor, and that a writ of *retorno habendo* should issue therein. The judgment is correct in substance, and is sufficiently formal. R. S., Chap. 119, Sec. 22.

No other objections being urged, the judgment will be affirmed.

Judgment affirmed.

PHOENIX INSURANCE COMPANY OF BROOKLYN

v.

A. H. CARLOCK.

Fire Insurance—Premium Note—Failure to Pay—Extension of Time—Waiver of Conditions—Evidence—Instructions.

In an action brought to recover upon a fire insurance policy this court holds as erroneous an instruction given in behalf of plaintiff, the question involved being as to whether certain extensions of time for the payment of the premium note amounted to a waiver of conditions in the note and policy setting forth the necessity for the prompt payment thereof.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of McLean County; the Hon. OWEN T. REEVES, Judge, presiding.

This was an action of assumpsit brought by appellee against appellant on a policy of insurance, issued by appellant on the dwelling house of appellee September 16, 1884, for \$2,000, which, among other conditions, contained the following:

"In case the assured fails to pay the premium note or order at the time specified, then this policy shall cease to be in force and remain null and void during the time said note or order remains unpaid after maturity, and no legal action on the part of this company to enforce payment shall be construed as reviving the policy. The payment of the premium note, however, revives the policy and makes it good for the balance of its term. No agent or employe of this company, or any other person or persons, have power or authority to waive or alter any of the terms or conditions of this policy, except only the general agent at Chicago, Illinois, and any waiver or alteration by him must be in writing."

At the time of receiving the policy appellee did not pay any cash, but for the premium gave a note as follows:

"\$62.50.

On the first day of October, 1885, for value received, I promise to pay to the Phoenix Insurance Company, of Brooklyn, New York (at the First National Bank in Bloomington, Illinois,) or order, sixty-two dollars and fifty cents in payment of premium on policy No. 0,156,750 of said company. If this note is not paid at maturity, said policy shall then cease and determine and be null and void, and so remain until the same shall be fully paid and received by said company. In case of loss under said policy this note shall immediately become due and payable, and shall be deducted from the amount of said loss. It is understood and agreed that this note is not negotiable.

A. H. CARLOCK."

October 2, 1885, the note had not been paid, and appellee wrote to T. R. Burch, appellant's general agent at Chicago, asking for an extension of time to pay his note. In this

Phoenix Ins. Co. v. Carlock.

letter he says: "I would like to have the time extended for three months, if possible, in order to get my stock ready for market and grain sold." To that letter Mr. Burch replied as follows:

"October 10, 1885.

"A. H. CARLOCK, Oak Grove, Illinois:

"*Dear Sir*—Replying to yours of the 2d inst., we will say, that we have extended the time for payment of your note given for policy No. 0,156,750 until December 10, 1885. We must ask you to give it prompt attention at that time and see that it is paid without further notice, for we must have the money before January 1.

"Very respectfully yours,

"T. R. BURCH, General Agent."

May 13, 1886, the note, not being paid, was placed by appellant in the hands of Kerrick, Lucas & Spencer, attorneys, at Bloomington, for collection, and on that day they sent notice of such fact to appellee. May 17th appellee replied, and among other things said: "I hope to get a little time to get this money, at least two weeks, and three would be better if it could be granted. * * * I can get it in two weeks or three out of my hogs," etc.

To that Kerrick, Lucas & Spencer replied, May 18, 1886:

"A. H. CARLOCK, Oak Grove, Illinois:

"Two weeks will be in ample time."

July 15, 1886, appellee sent \$50 to Kerrick, Lucas & Spencer which was credited on the note. In the letter inclosing the \$50, appellee said: "I can settle it (the note) in full in eight or ten days, or not longer than two weeks."

To that, Kerrick, Lucas & Spencer replied:

"A. H. CARLOCK, Oak Grove, Illinois:

"*Dear Sir*—Your favor of July 15th containing \$50 reached us to-day, and we have indorsed that amount on your note to the Phoenix Insurance Company. * * * We are willing to carry it for you for the next two weeks as you request."

August 19, 1886, Kerrick, Lucas & Spencer wrote to appellee:

"*Dear Sir*—Please arrange to pay the balance due the

Phoenix Insurance Company as soon as possible; we would like to close the matter up."

December 15, 1886, the balance of the note not being paid, Kerrick, Lucas & Spencer again wrote appellee: "You are hereby notified that your note in favor of Phoenix Insurance Company * * * is in our hands for collection. Please attend to the matter at once and save costs."

Appellee testified, and there was no testimony to the contrary: "I am the plaintiff; the loss of personal property was \$175; that on the house about \$1,600; the fire was the 13:h of June, 1888."

No question was made, but proper notice of the fire was given to appellant. It was conceded that Mr. Burch was the general agent of appellant, but Kerrick, Lucas & Spencer were only "the attorneys for the defendants at that time for the collection of the note."

On that record the Circuit Court instructed the jury on behalf of appellee as follows: "The court instructs the jury, that if they believe, from the evidence, that the premium note of \$62.50 was given by the plaintiff to the defendant in full consideration for the policy in evidence; and if the jury further believe, from the evidence, that at the time, or about the time of maturity of the said note, the defendant extended the time for the payment of the same until the 15th day of the following December, unconditionally; and if the jury believe, from the evidence, that the defendant, by its agent, after the lapse of such extension, gave further extension of the time upon said note, then, in such case, the jury have a right to say that such acts of extension of time on said note constitute a waiver of the provision in the policy in relation to prompt payment of the note, and in such case the jury should find the issues for the plaintiff upon the question of waiver. And in case you find for the plaintiff, you will assess plaintiff's damages at what the evidence shows is due the plaintiff, less the balance due upon his note offered in evidence."

The jury returned a verdict of \$974 in favor of appellee, upon which judgment was rendered.

I. C. R. R. Co. v. Miller.

Messrs. KERRICK, LUCAS & SPENCER, for appellant.

Messrs. TIPTON & BEAVER and W. B. CARLOCK, for appellee.

CONGER, J. We think the language of the instruction given for appellee was erroneous and misleading. It is too much to say to the jury that from the mere fact of appellant, or its agents, giving extensions of time for definite periods, that such extensions would constitute a waiver of the conditions in the note and policy in this respect.

The most that could be said would be that if from all the circumstances and the course of dealing between the parties as shown by the evidence, the jury believed, as a matter of fact, that appellee was reasonably justified in believing that the company did not intend to insist on the condition, and that appellee acted on such belief, that under such circumstances the condition might be considered as waived.

In other words, the extensions of time of payment can not be declared by the court, as a matter of law, to waive the condition in the note and policy, but they are circumstances which the jury may take into consideration in determining whether or not a waiver was intended by the parties.

For the error of giving this instruction the judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

ILLINOIS CENTRAL RAILROAD COMPANY

V.

JACOB F. MILLER ET AL., FOR USE, ETC.

Railroads—Freight—Delay in Transportation—Limitations—Act of 1849, Secs. 17, 18—Shipping Receipts—Bills of Lading—Former Adjudication—Evidence—Practice—Finding of Facts.

1. To be a contract in writing a written instrument must set forth the undertakings of the parties to it so plainly as to require neither parol testimony nor the promises or duties which the law would imply from the facts stated, to ascertain the extent and force thereof.

32	259
142	571
32	259
54	685

2. Where a shipping receipt upon which recovery is sought to be had does not contain any express agreement to forward certain goods to their destination, to ascertain the carrier's undertaking with reference thereto, resort must be had to the duties imposed, and promises implied by law.

3. A suit against a common carrier may be maintained in the name of any person having either a general or special property in the goods involved, and an action properly brought by such person, will be a bar to any subsequent suit against the carrier by another party having either a general or special property in the same goods for the same damages.

4. The presentation of shipping receipts, attached to which are drafts upon purchasers of grain, drawn by sellers thereof, shows that the property is in the hands of the carrier, and amounts to a delivery to the purchaser.

5. In order that a former judgment shall amount to a bar to a subsequent suit, it is enough that the status of the action was such that the parties might have had their suit disposed of according to their respective rights, if they had presented all their evidence and the court had properly understood the facts and correctly applied the law. It either failed to present all his proofs, or improperly managed his case, or subsequently discovers additional evidence in his behalf, or if the court finds contrary to the evidence or misapplies the law, the judgment, until corrected or properly vacated, is as conclusive upon the parties as though it had settled their controversy in accordance with the principles of abstract justice.

6. Reasonable time, within the meaning of a contract of affreightment, must be determined by the circumstances attending and surrounding a given transaction.

7. It *seems*, that if a shipper promises the carrier to do something which will enable the latter to make the time of transportation shorter than it otherwise would be, and fails to perform it, such fact can be shown by the latter in excuse for the delay, and without changing or modifying the contract of affreightment.

8. In the case presented, this court holds that there was no such delay in the transportation of the grain involved, as would render defendant liable in damages herein; that in a former action defendant was charged with the same negligence with reference to the same merchandise as is here set up, and that the same is a bar to the present suit.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of McLean County; the
HON. OWEN T. REEVES, Judge, presiding.

Messrs. WILLIAMS & CAPEN, for appellant.

The instruments sued upon in these cases are not simple contracts in writing within the meaning of section 17 of statute of limitations of 1849, but are simple receipts for

the goods, from which the law implies a verbal promise to carry to the place of destination, but no such promise is expressed in the writing; and an action upon such implied promise falls within section 18 of that statute, and is barred in five years. *Daniel on Neg. Insts.* §§ 35, 36; *Currier v. Lockwood*, 40 Conn. 349; *Beeching v. Westbrook*, 8 M. and W. 411; *Garland v. Scott*, 15 La. Ann. 143; *Smith v. Allen*, 5 Day, 337; *Bowles v. Lambert*, 54 Ill. 237.

The owner or one having a special property in the goods, can alone sue for damage to the goods in the absence of an express written contract for the carriage.

To constitute an instrument a bill of lading, an essential element is an express promise or contract to carry the freight to its destination and there deliver to the consignee. The instruments sued upon in these cases contain no such promise or contract, and therefore are not bills of lading. *Webster's Dictionary*, "Bill of Lading;" *Hutchinson on Carriers*, §§ 120, 122; *Daniel on Neg. Insts.* § 1728; *Benjamin on Sales*, § 813, note (f); *Angell on Carriers*, § 464; *Bacon's Abr.*, Art. Merchant and Merchandise, (1); *Lickbarrow v. Mason*, 1 S. L. C., top page 759, 719 *ad fin.* 722, 732; 1 *Schouler's Pers. Prop.* 408; *Hyde v. Trent Co.*, 5 T. R. 389 (397); *Wayland v. Moseley*, 5 Ala. 430; *May v. Babcock*, 4 Ohio, 334, (341); *Rowley v. Bigelow*, 12 Pick. 307.

For cases showing the difference between a bill of lading and a shipping receipt, see *Thompson v. Trail*, 2 C. & P. 334; *Craven v. Ryder*, 6 Taunt. 433; *Coosa Co. v. Barclay*, 30 Ala. 120; *Holbrook v. Vose*, 6 Bosw. 76, (109); *Hathesing v. Laing*, L. R. 17 Eq. Cas. 92 (7 Mòak, 705).

Wherever, in our own reports, a bill of lading is involved, it contains an express promise "to forward" or "to transport." *Dunseth v. Wade*, 2 Scam. 285; *Dixon v. Dunham*, 14 Ill. 324; *Bissell v. Price*, 16 Ill. 408; *I. C. R. R. Co. v. Johnson*, 34 Ill. 389; *T. P. & W. R. R. Co. v. Merriman*, 52 Ill. 123; *I. C. R. R. Co. v. Owens*, 53 Ill. 391; *C. & N. W. R. W. Co. v. Montfort*, 60 Ill. 175; *Field v. C. & R. I. R. R. Co.*, 71 Ill. 458; *M. D. & T. Co. v. Moore*, 88 Ill. 136; *M. C. R. R. Co. v. Boyd*, 91 Ill. 268; *Adams Ex. Co. v. Boskowitz*, 107 Ill.

660; W., St. L. & P. R. W. Co. v. Jaggerman, 115 Ill. 407; Wallace v. Long, 8 Ill. App. 504.

The only case, we think, that can be claimed to be an exception to this is that of I. C. R. R. Co. v. Frankenberg, 54 Ill. 88, but there the instrument is called "a receipt or bill of lading," indiscriminately; the decision in no way depends upon that question, nor is it discussed.

The written instruments sued upon contain no promise to carry, and therefore give no right of action in themselves against the carrier, and the plaintiffs in these suits having neither a general nor special property in the goods, can not maintain the actions.

The owner or any one having a special property in the goods, is a proper party to sue the carrier for loss or damage on the goods for the wrongful act or default of the carrier, and a judgment in such suit is a bar to an action brought by any one else for the same damages. See Hutchinson on Carriers, Chap. XIII, and cases *infra*.

The judgment in the case of Cobb, Christy & Co. (who were the owners of the corn in controversy) is a bar to these actions, which are for the identical damages. Green v. Clark, 12 N. Y. 343; Bigelow on Estoppel, 77-8.

If a party have an interest in the result of a suit, which might be brought either in his name or the name of another, and it is, by his consent, brought in the name of another, and he consents to the carrying on of the suit, and is to participate in the amount recovered, if there be a recovery, he is a privy in law and bound by the judgment, and such judgment will be a bar to a new suit instituted by the party who participated in carrying on the former suit. Cole v. Favorite, 69 Ill. 457; Hanna v. Read, 102 Id. 596; Drake v. Perry, 58 Id. 122; Bennitt v. W. S. M. Co., 18 Ill. App. 17, 119 Ill. 9; Att'y Gen. v. C. & E. R. R. Co., 112 Ill. 520; Harmon v. Auditor, 22 Ill. App. 135; Woodhouse v. Duncan, (Ct. App. N. Y.), 13 N. E. Rep. 334; Green v. Clark, 12 N. Y. 343; Miller v. L. M. T. Co., (U. S. Cir. Ct. Mo.), Chi. Leg. News, Oct. 1, 1888, p. 18; Stoddard v. Thompson, 31 Ia. 80; McNamee v. Moreland, 26 Ia. 69; Finn v. W. R. R. Co.,

I. C. R. R. Co. v. Miller.

112 Mass. 524; I. C. R. R. Co. v. Cobb, 64 Ill. 132-3; Calkins v. Allerton, 3 Barb. 171; Smith's Leading Cases, II, 435; Crow v. Bowlby, 68 Ill. 23.

The judgment or decree of a court possessing competent jurisdiction is final, not only as to the matters actually determined, but as to every other question, title and right involved in the litigation and passed upon by the court. Hawley v. Simons, 102 Ill. 115; Hanna v. Read, 102 Ill. 595 (605); Cole v. Favorite, 59 Ill. 457; Gray v. Gillilan, 15 Ill. 453; Vandlingham v. Ryan, 17 Ill. 25; Taylor v. Field, 22 Ill. App. 436.

It is the duty of the consignee promptly to receive from the carrier the goods at the point of destination. If he fails to do this, it then becomes the duty of the carrier to warehouse them, and to take reasonable care of them for a reasonable time, on account of the consignee, or whom it might concern. Redfield on Railways, I, pp. 52 and 53; II, p. 65; pp. 16, 17 and 18; Angell on Carriers, pp. 502, 291; Porter v. C. & R. I. R. R. Co., 20 Ill. 407; C. & A. R. R. Co. v. Scott, 42 Ill. 132; Crawford v. Clark, 15 Ill. 561; Ostrander v. Brown, 15 Johns. 39; Hemphill v. Chenie, 6 W. & S. 62; G. W. Ry. v. Crouch, 3 H. & N. 183; Thomas v. B. & P. Ry. Co., 10 Metc. 472.

Messrs. HAMILTON SPENCER, BENJAMIN & MORRISSEY and JOHN E. POLLOCK, for appellees.

The bills of lading or shipping receipts are contracts in writing. The Delaware, 14 Wal. 579; Russell v. Whipple, 2 Cow. 536; Kimball v. Huntington, 10 Wend. 675; Luquer v. Prosser, 1 Hill, 258; Sackett v. Spencer, 29 Barb. (N. Y.), 180; Franklin v. March, 6 N. H. 364; Cummings v. Freeman, 2 Hump. (Tenn.) 143; Carver v. Hayes, 47 Me. 257; Brady v. Chandler, 31 Mo. 28; Huyek v. Meador, 24 Ark. 191; Anderson v. Pierce, 36 Ark. 293; Ashley v. Vischer, 24 Cal. 322, 328; Jacquin v. Warren, 40 Ill. 459; I. C. R. R. Co. v. Schwartz, 13 Ill. App. 496; I. C. R. R. Co. v. Frankenberg, 54 Ill. 90, 99; I. C. R. R. Co. v. Johnson, 34 Ill. 389, 393.

The consignor can maintain an action of assumpsit against the carrier for a breach of the contract embodied in the bill of lading given to him by the carrier. *Blanchard v. Page*, 8 Gray, 281; *Hooper v. C. & N. Ry. Co.*, 27 Wis. 81; *Southern Ex. Co. v. Craft*, 49 Miss. 480; *Carter v. Graves*, 9 Yerg. (Tenn.) 446; *Finn v. Western Railroad*, 112 Mass. 524; *Atkinson v. C. R. I. & P. Ry. Co.*, 80 Mo. 213; *Northern Line Packet Co. v. Shearer*, 61 Ill. 263; *C. & A. R. R. Co. v. Shea*, 66 Ill. 472; *I. C. R. R. Co. v. Schwartz*, 13 Ill. App. 490; *O. & M. R. R. Co. v. Emrich*, 24 Ill. App. 245; *Hutchinson on Carriers*, § 736; *Schouler on Bailments and Carriers* (2d Ed.), § 570.

It is of the essence of every kind of estoppel, that the subject of it should be certain. When it is doubtful (either from the record or from evidence designed to explain the same) upon which of several issues the judgment proceeded, the subject is still at large. It is essential that the issue in the second action, upon which the judgment is brought to bear, was a material issue in the first action, necessarily determined by the judgment therein, and that the former judgment was upon the merits. *Bigelow on Estoppel* (4th Ed.), 55, 57; *Russell v. Place*, 94 U. S. 606, 608, 610; *Chrisman v. Harman*, 29 Grattan, 494, 499; *Hooker v. Hubbard*, 102 Mass. 239, 245; *Foster v. Busteed*, 100 Mass. 409, 411; *Burlen v. Shannon*, 99 Mass. 200; *Cook v. Burnley*, 45 Tex. 97, 117; *Packett Co. v. Sickles*, 5 Wal. 580, 592; *Hunter v. Davis*, 19 Geo. 413, 415; *Aiken v. Peck*, 22 Vt. 225, 260; *Church v. Chapin*, 35 Vt. 223, 231; *Dutton v. Woodman*, 9 Cush. 255, 261; *Supples v. Cannon*, 44 Conn. 424, 428; *Hughes v. United States*, 4 Wall. 232, 237.

Where a railroad company, partially under the military control of the government, receives freight and issues its bills of lading for the same without containing any exception as to the governmental control, it thereby assumes the duties of a common carrier of goods for hire, and is subject to the liability attaching to that function. *I. C. R. R. Co. v. McClellan*, 54 Ill. 58; *I. C. R. R. Co. v. Ashmead*, 58 Ill. 487; *I. C. R. R. Co. v. Cobb*, *Christy & Co.*, 64 Ill. 128; *I. C. R. R. Co. v. Schwartz*, 13 Ill. App. 490.

I. C. R. R. Co. v. Miller.

Except in the recital or the acknowledgment of the goods, and of their quantity and the condition when received, bills of lading are strict'y written contracts between the parties, and come within the general rule which prohibits the introduction of parol evidence to contradict or vary written contracts. *Hutchinson on Carriers*, § 126; *The Delaware*, 14 Wal. 579, 601; 1 *Greenleaf on Evidence*, § 275; *M. Ins. Co. v. Morrison*, 62 Ill. 242; *Bayard v. Malcolm*, 1 Johns. 467; *I. C. R. R. Co. v. Schwartz*, 13 Ill. App. 490; *I. C. R. R. Co. v. Cobb, Christy & Co.*, 64 Ill. 134-37.

CONGER, J. In January, 1865, the United States Government made a contract with Cobb, Christy & Co., for 500,000 bushels of corn and 100,000 bushels of oats to be delivered at Cairo, Illinois, for the use of the army.

During the winter and spring of 1864-5, one Elihu Fallis, who was acting as the agent of Cobb, Christy & Co., bought large quantities of corn for them at different points along the appellant's road, to be shipped to Cairo, at which place the firm of Cobb, Blaisdell & Co. (Mr. Cobb being the principal partner in both firms), acted for Cobb, Christy & Co., in receiving this corn, paying freight therefor, and turning it over to the government. The cars of corn upon arriving at Cairo could not be unloaded, either by the railroad, or Cobb, Blaisdell & Co., but, when the corn was accepted by the government, the cars were placed upon the government switch and unloaded by its own men. As the season advanced the corn arriving at Cairo began to be rejected by the government, on the ground that it was damaged and not merchantable, until the yards at Cairo and the side-tracks of the company, for quite a distance north of that point, became so filled with these cars of corn, that the company were unable to deliver, and about the first of February the company refused to receive freight faster than it could deliver at Cairo, and by the first of March had practically refused to receive at all. In the latter part of March, 1865, it is insisted by appellant that it had refused to ship any more corn to Cairo for Cobb, Christy & Co., because of the glut of cars at that

point and north along its line, and that thereupon Fallis, as the agent of Cobb, Christy & Co., to induce appellant to furnish cars for the shipment of the corn, promised Mr. Arthur, the general superintendent of appellant's road, that such cars should be promptly unloaded upon their arrival at Cairo, and upon these representations cars were furnished to Fallis, and the corn in question shipped. The corn, however, was not received, because greatly damaged, and this action is brought by appellees for the use of Cobb, Christy & Co., to recover upon the shipping receipts or bills of lading issued by the appellants to appellees. The declaration declares upon six shipping receipts, or bills of lading, exactly the same, except as to the date, the number of cars, weight, etc., and in three of them rate per 100 pounds is expressed. These instruments are as follows:

"PANOLA STATION, April 5th, 1865.

Received from Miller & Smith, account E. Fallis, in apparent good, order by the Illinois Central Railroad Company, consigned to Cobb, Blaisdell & Co., Cairo, the following articles, as marked and described in the margin, subject to the conditions and regulations, as per published tariff of said company, and payment of the freight at the rate of 42 cents per 100 lbs., and such other expenses or charges as may have accrued upon said articles. It is especially agreed and understood that the company are not responsible for loss of goods of which the contents are unknown; for leakage of any kinds of liquids; breakage of any kinds of glass; carboys of acids, or articles packed in glass, stoves or stove furniture, castings, machinery, carriages, furniture, musical instruments of any kind, packages of eggs, or for loss or damage on hay, hemp, cotton, or any articles, the bulk of which renders it necessary to be shipped in open cars, or for damage on perishable property of any kind, occasioned by delays from any cause, or change of weather, or for damage or loss by fire, or for loss or damage on the lake or rivers, unless it can be shown that such damage or loss occurred through the negligence or default of the agents of the company. And it is further especially understood, that for all loss and damage occurring

in the transit of said packages, the legal remedy shall be against the particular carrier or forwarder only, in whose custody the said packages may actually be at the time of the happening thereof; it being understood that the said Illinois Central Railroad Company assumes no other responsibility for their safety or safe carriage than may be incurred on its own road. All packages subject to charge for cooperage, if necessary. Marks and Consignee. No. Description of Articles. Weight."

It is insisted by appellants that this suit is barred by the statute of limitations, which was relied upon as a defense in the court below. The cause of action accrued in April, 1865, and the suit was begun on the 29th day of March, 1881. The statute of limitations in force at the time, and that governs these cases, is the statute of 1849, and the 17th section of that act is as follows: "All actions founded upon any promissory note, simple contract in writing, bond, judgment or other evidence of indebtedness in writing, made, caused or entered into after the passage of this act, shall be commenced within sixteen years after the cause of action accrued and not thereafter." The 18th section reads as follows: "All actions, founded upon accounts, bills of exchange, orders, or upon promises not in writing, express or implied, made after the passage of this act, shall be commenced within five years next after the cause of action shall have accrued, and not thereafter." Gross' Statutes, 430. The question is, under which of these two sections of the statute do the alleged causes of actions in these cases fall? Appellees claim that they fall under the 17th section, and appellants insist that they fall under the 18th. If these instruments are "simple contracts in writing" they are governed by the 17th section, and the action is not barred. In Bishop on Contracts, Sec. 57, it is said: "A written contract is one which, in all its terms, is in writing. In Chitty on Contracts, Vol. 1, page 93, it is said: "The instrument must contain the words 'of final agreement;'" while in the recent case of Plumb v. Campbell, N. E. Reporter, of Dec. 28, 1888, the Supreme Court of this State in passing upon this question, use the following language: "If it be true

that the agreement as set forth in writing is so indefinite as to necessitate resort to parol testimony to make it complete, the law is that in applying the statutes of limitations, it must be treated as an oral contract."

It is clear, we think, from these authorities and others which might be cited, that a written instrument, to be a contract in writing, must set forth the undertakings of the parties to it so plainly as to require neither parol testimony nor the promises or duties which the law would imply from the facts stated, to ascertain the extent and force of the contract.

Many cases have been cited by counsel upon the question of what are and what are not contracts in writing, but it would serve no good purpose to review them; for it is not a question of what a writing must contain to be a contract, but, does this instrument, by a fair interpretation of its language, contain an express promise to forward and deliver the goods? If it does it is a written contract, and the present action is not barred. If not it is but a receipt for the goods, and an action would be barred in five years.

In examining this instrument to ascertain appellant's undertaking, it is a little difficult to look alone to the natural import of the words used, unaided by the duties imposed and promises implied by law. From the language used we are unable to find any express promise on the part of appellants to forward the goods to Cairo.

It is true the acceptance of the goods, evidenced by these instruments, imposed a duty to carry them to their marked destination, and when the law imposes a duty it will raise an implied promise to perform that duty, and upon a failure to perform it, suit may be maintained for the non-performance of the duty, or in assumpsit on the implied promise; hence, taking the facts stated in the receipts, together with the duties and promises the law implies from those facts, we have no difficulty in determining the rights and duties of the parties to the instrument, but from the language alone we are left in doubt. We can not concede to counsel that these instruments are strictly bills of lading. It is true they have been so called by both the Supreme Court

and this court, but in all cases when so mentioned the question of limitation was not under consideration.

A bill of lading, as defined by Daniel on Negotiable Instruments, Sec. 1728, "is a written acknowledgment by the master of a ship, or the representative of any common carrier, that he has received the goods therein described, for the voyage or journey stated, to be carried upon the terms, and delivered to the persons therein specified. It is at once a receipt for the goods, which renders the carrier responsible as their custodian, and an express written contract for their transportation and delivery." Keeping in view this definition of a bill of lading, together with the rule above stated, that to be a written contract all its terms and undertakings must be in writing, we are unable to find in these shipping receipts any express promise on the part of appellant to forward the goods to the consignees at Cairo. Such a promise can not be said to be in the first part of the instrument, for that is but a receipt of the goods, with the rate of freight and name of consignee.

The only sentence that can be claimed as importing or implying it is the last, which is as follows: "And it is further especially understood, that for all loss and damage occurring in the transit of said packages, the legal remedy shall be against the particular carrier or forwarder only, in whose custody the said packages may actually be at the time of the happening thereof, it being understood that the said Illinois Central Railroad Company assumes no other responsibility for their safety or safe carriage than may be incurred on its own road." It might be urged with much force that this language is an attempt to limit appellant's liability as a common carrier, and could serve no purpose unless the instrument was a contract to forward; still, we are inclined to think that these words in themselves do not import an express undertaking to forward and deliver to the consignee at Cairo. After giving full weight to the words of the instrument, with all the meaning they convey to the undertaking, it is believed that in seeking for an express undertaking on the part of appellant to forward, it can not be found in the instrument,

but, to ascertain the undertaking of appellant, resort must be had to the duties imposed, and promises implied by law.

It is also contended by appellant that a right of action in the present case is barred by the judgment in the case of Cobb, Christy & Co. against appellant, reported in 88 Ill. 394. The record of that case, together with the opinion of the Supreme Court, was put in evidence in this, and there is no contention but that both suits are about the same corn, and the same alleged negligence on the part of appellant.

The tenth count of the declaration, in that case, charges that Cobb, Christy & Co., through the firm of Miller & Smith (the nominal plaintiff in this suit), delivered to appellant as a common carrier, at Panola, Illinois, certain corn, which is the same as described in the shipping receipts upon which this action is based, to be carried to Cairo and there delivered to Cobb, Blaisdell & Co., for Cobb, Christy & Co., and that appellant negligently failed to do so, whereby the corn was damaged and they were injured. To this declaration appellant filed a plea of not guilty, and the statute of limitations; and the verdict of the jury was "not guilty." The case was appealed to the Supreme Court, and is reported in 88 Illinois, 394.

It is the law that a suit may be maintained against a common carrier in the name of any one having either a general or special property in the goods, and that an action properly brought by any one having such a right of action, will be a bar to any subsequent suit against the carrier by another party, having either a general or special property in the same goods, for the same damages. Redfield on Carriers, Sec. 321; Hutchinson on Carriers, Chap. XIII.

It would seem, therefore, to be clear, that if Cobb, Christy & Co., at the time of their suit against appellant had a general or special property in the corn, the judgment in that case would be final, and that the present plaintiffs would be barred from bringing an action for the same damages upon the shipping receipts given to them.

This court, in the case of I. C. R. R. Co. v. Schwartz, 13 Ill. App. 490, in passing upon this same question, and in speaking of the facts as shown by the record in that case, say:

"The corn was sold by appellee, Schwartz, to Fallis, to be delivered on the cars, consigned to Cobb, Christy & Co., government contractors, at Cairo, and to be paid for by bills drawn by Fallis on the consignees. The contract between Fallis and Cobb, Christy & Co., was that the corn was to be inspected by government inspector on its arrival at Cairo; and when it passed inspection they were to receive it and pay contract price. The corn did not pass the inspection; was never delivered to the consignees, nor did they ever make any payment upon it. Upon this evidence the central question presented to the jury at the trial of that case was, had Cobb, Christy & Co. such an interest in the corn, either general or special, as to give them a right of action against the carrier for a failure to deliver it in a reasonable time; and the jury, by their verdict, found they had not, upon which a judgment was rendered against them for costs, and the judgment was affirmed by the Supreme Court, 88th Ill. 394." And it was held there was no bar.

It would also seem that in the case of Cobb, Christy & Co. v. Appellant, judging from the opinion in 88 Illinois, the evidence in that case showed the corn was to be the property of Cobb, Christy & Co., only upon the contingency that it should pass inspection when it reached Cairo. And the court in its original opinion held the jury were warranted in finding that they had no special property in the corn, and no right of action. The record in this case, however, presents an entirely different state of facts as existing at the time of the transaction, upon which all these suits are based.

It appears from the evidence in the present record that Fallis, as the agent of Cobb, Christy & Co., purchased for them the corn at various stations along the Central road, to be delivered on board appellant's cars, in new gunnies. The corn was so delivered, and the vendors drew drafts on Cobb, Christy & Co., for the price, attaching to such drafts the shipping receipts received from the railroad company, and Mr. Cobb says he thinks these drafts were paid, at least they were all sent to the firm of Cobb, Christy & Co., and the shipping receipts were at the same time delivered to them, and these

being the documentary evidence of the shipper's property in the hands of the carrier, such delivery of the shipping receipts to Cobb, Christy & Co. was a good delivery of the corn to them, so as to vest the property in them. It was as effective in transferring the possession as the delivery of the keys of a warehouse is of the goods contained in it. M. C. R. R. Co. v. Phillips, 60 Ill. 198.

According to the testimony in this record, then, there is absolutely nothing shown in the original contracts made by Fallis, as agent of Cobb, Christy & Co., when he purchased the corn, about government inspection at Cairo or elsewhere; it was an absolute purchase of the corn, whereby the vendor's duties and responsibilities ceased when the corn was delivered on board the cars. After these contracts were made and the corn bought, there seems to have been some kind of an effort on the part of Fallis to get the contracts changed, so as to make them depend on government inspection at Cairo, but what the contract was or whether any at all was ever made does not appear. Counsel for appellant stated to the court on the trial below that he desired to prove by Mr. Fallis that he did not buy this corn subject to government inspection, and that he afterward notified the vendors that he would accept it only by government inspection, but was not permitted by the court to ask the question.

In determining whether the judgment in the case of Cobb, Christy & Co., against appellant is a bar to the present action we must take the facts as we find them presented by the testimony before us, and if from the facts so appearing we can see that appellant has once answered for its supposed negligence in failing to forward this corn, in a proper action, to those having such property or interest in the corn as entitled them to sue for the same damages as are claimed now, the question is *res adjudicata*.

It is true, before the former judgment can be an estoppel, it must be on the merits of the controversy. But in the language of Freeman on Judgments, Sec. 260: "To create such a judgment it is by no means essential that the controversy between plaintiff and defendant be determined 'on the

merits' in the moral or abstract sense of these words. It is sufficient that the status of the action was such that the parties might have had their law-suit disposed of according to their respective rights, if they had presented all their evidence and the court had properly understood the facts and correctly applied the law. But if either party fail to present all his proofs, or improperly manage his case, or afterward discover additional evidence in his behalf, or if the court find contrary to the evidence, or misapply the law, in all these cases the judgment, until corrected or vacated in some appropriate manner, is as conclusive upon the parties as though it had settled their controversy in accordance with the principles of abstract justice."

We do not know what the testimony in the former case of Cobb, Christy & Co. against appellant was, except as we may judge from the opinion in 88 Illinois, but we are compelled to hold from the evidence in this record that Cobb, Christy & Co., at the time of such suit, had such an interest in the corn as entitled them to sue appellant for the damages occasioned by the alleged failure on the part of appellant to forward the corn; that in said suit appellant was charged with the same negligence as in this, and has answered to, and been vindicated from said charge of negligence. To permit a recovery in the present action would require appellant to be twice vexed for the same cause of action. "This principle of *res adjudicata* embraces not only what was determined in the former case, but also extends to any other matter properly involved, and which might have been raised and determined in it." *Rogers v. Higgins et al.*, 57 Ill. 247.

In the former suit the negligence of appellant as the ground of action was distinctly charged in the declaration, and denied by the plea, and was therefore a matter properly involved, and which might have been raised and determined in it.

While the Supreme Court in their first opinion, in 88 Illinois, say the question of the ownership of the corn was the central one, still, in the opinion filed on the petition for rehearing, they also say that the other question for the jury

to decide was, was there any such delay in the transportation of this grain, as, under the circumstances, would render appellant liable; and this question they say belongs to both phases of the case.

If, however, there is any question as to the correctness of the position already taken in this opinion, we think, upon the merits of the controversy, the law is with the appellant. We reach this conclusion from a careful consideration of the testimony, which is evidently the same as in the case in 88 Illinois; at least the conclusions reached and announced by the court upon this point are fully supported by the testimony in this record, and we can not give our views upon this question better than by quoting and adopting the language there used:

"But, it is urged, the plaintiffs had such a special property in this grain as entitled them to maintain this action. Conceding this, the other question for the jury to decide is, was there any such delay in the transportation of this grain, as, under the circumstances, would render the defendants liable. And this question belongs to both phrases of the case. What facts had the jury before them on this point? Fallis and all other shippers of grain or other goods at that time knew there was a very large accumulation of cars on the track at Cairo, which, for some cause not chargeable to defendants, had not been unloaded, and caused an obstruction to the approach of other cars.

"Under these well known circumstances and this obstruction to regular transportation, the officers of the road refused to receive this corn, alleging as a reason this accumulation, and that neither the Government nor the plaintiffs would receive corn as fast as they brought it to Cairo, thus keeping their cars full on the track and causing this obstruction and glut. Under these circumstances Mr. Arthur, the general superintendent of this road, when applied to for transportation of the corn, refused to supply cars, for the reason they could not get rid of the corn when it reached Cairo. Fallis, to induce the superintendent to furnish cars, faithfully promised they should be promptly unloaded at Cairo. Relying on this promise the cars were furnished, but, when the

corn arrived at Cairo, after some delay in reaching there, caused by accumulation of cars on the track at different stations, the plaintiffs positively refused to have anything to do with it. There was no one there on their behalf to receive it and unload the cars. How a jury of reasonable, common-sense men could, under these circumstances, and with these facts before them, find any other verdict than they did, is incomprehensible."

The statement of Mr. Fallis, giving the reasons he urged upon Mr. Arthur to supply him with cars after he had refused to do so, on account of the condition of the road being blocked with cars, is as follows, and is the identical testimony given in the former case in a deposition, and by agreement incorporated into this record. He says:

"The most of the corn in this suit was loaded the first week in April or the last of March; some of it in February; the particular arrangement was made with Mr. Arthur for these cars; he said Cobb, Blaisdell & Co. had been having a large share of cars; I told him this grain had to be shipped by April 10th; he said they had had their proportion; I told him that the shippers along the line would be great losers—that they would be broken up; he said if that was so he would send cars, and he did send them; I told him the grain would be unloaded promptly, and upon that condition he furnished cars; the cars were furnished up to April 8th or 10th."

But it is insisted that these representations and promises on the part of Fallis are not proper to be considered, because they modify the written contract of affreightment, by adding a condition not named in it, and it seems to be so held in the Schwartz case.

If we are correct in holding these shipping receipts as not being written contracts, but only receipts for the goods, the objection has no force; but if it be conceded they are contracts they require no more than the law would imply, that is, that the corn should be forwarded in a reasonable time—and we are at a loss to perceive how this testimony adds to, or in any way changes or modifies the contract of affreightment.

The contract requires appellant to forward the corn in a

reasonable time. What is a reasonable time for the performance of that duty is determined by the circumstances attending and surrounding the transaction.

If the shipper promises the carrier to do something which will enable the latter to make the time of transportation shorter than it otherwise would be, and fails to perform it, why can not such fact be shown by the carrier in excuse for the delay, and that, too, without changing or modifying the contract of affreightment? The carrier offers the evidence to show that the contract has been executed according to its terms within a reasonable time.

For the reason above given we are of opinion that appellees have no right to recover in this action, and the judgment of the Circuit Court will be reversed.

Judgment reversed.

WALL, P. J., took no part in the decision of this case.

The clerk will recite in the final order the following as the finding of facts by this court:

The court finds that there was no such delay by the appellant in the transportation of the grain in this suit mentioned, as would render it liable for damages in the present action.

The court also finds that by the evidence appearing in this record, Cobb, Christy & Co., at the time of the suit by them against appellant, reported on page 394 of 88 Illinois, had such an interest in the corn then sued for, as entitled them to maintain a suit for any wrongful delay in its transportation. That the corn mentioned in that suit and in this is the same, and the same alleged delay in transportation is relied upon in both suits, and that such former suit was a bar to the present suit.

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HERSCHEL O'HAIR

v.

THE PEOPLE.

Clerks—Witnesses—Subpœnas—Vacation—Grand Jury.

The clerk of the Circuit Court may, in vacation, at the request of the State's attorney, issue subpœnas for witnesses to appear before the grand jury at the ensuing term of court.

[Opinion filed November 27, 1889]

APPEAL from the Circuit Court of Edgar County; the Hon. J. F. HUGHES, Judge, presiding.

Messrs. HENRY S. TANNER and HENRY VAN SELLAR, for appellant.

Messrs. GEORGE HUNT, Attorney General, and FRANK P. HARDY, State's Attorney, for appellee.

CONGER, J. The question presented by this record is as to the power of the clerk of the Circuit Court, in vacation, upon request of the State's attorney, to issue subpœnas for witnesses to appear before the grand jury at the ensuing term of the court.

Appellant was duly served with such a subpœna a few days before the Circuit Court convened, which he disregarded and went out of the State, where he remained until after the grand jury was discharged, when he returned to this State. The State's attorney procured from the court an attachment, upon which appellant was brought into court, and upon the foregoing facts appearing, was fined by the court \$25 and costs, from which decision of the court he appeals. No statute directly authorizes the issuing of subpœnas in such cases, nor has our attention been called to any adjudicated cases where this precise question was involved.

It is insisted by counsel for appellant that no power exists in the State's attorney to cause subpoenas to be issued prior to the organization of the grand jury; that there is no cause or action in existence authorizing the issuing of subpoenas until the grand jury has actually begun the investigation of an alleged offense. This, in our judgment, is a misapprehension of the relative powers and duties of the State's attorney and the grand jury; for while these have been largely regulated by statute, still we must resort to the common law for the general principles governing them in cases where the statute is silent. At common law it was the duty of the public prosecutor to prepare indictments and submit them together with the witnesses to the grand jury when organized. The prosecution originated in the mind of the prosecutor, and the grand jury were called upon to pass upon the bill and evidence thus submitted, and either find it to be a true bill or ignore it. In other words, the public prosecutor, whose duty it was to see that all supposed violations of law were punished, was made the instrument of preparing and bringing before the grand jury criminal charges, that they might determine whether an indictment should be found or not. Where the supposed offender had been committed by an examining magistrate to answer to the grand jury, the prosecuting witnesses were recognized to appear and no further steps were necessary to have them present; but when there had been no preliminary hearing, and the prosecutor desired to present a bill against one whom he deemed an offender, it was his duty, prior to the organization of the grand jury, to have a bill prepared and engrossed, and have the witnesses present to support it.

Chitty, in Vol. 1, p. 316, of his Criminal Law, says: "The grand jury being thus sworn, charged and empowered to execute the duties of their office, the bill must be preferred before them. Previous to this, the prosecutor must cause it to be properly prepared and engrossed on parchment."

In Wheaton's Criminal Pleading and Practice, Sec. 354, it is said: "It is essential to the validity of an indictment that it should be submitted to the grand jury by the prosecuting

officer of the State." In Sec. 338 of the same work, the author says that the view as accepted in the United States Court, and in most of the States is: "That the grand jury may act upon and present such offenses as are of public notoriety and within their own knowledge, such as nuisances, seditions, etc., or such as are given them in charge by the court, or by the prosecuting attorney, but in no other cases without a previous examination of the accused before a magistrate." While the power of the grand jury is not thus limited by the practice and law of this State, and they doubtless may originate a bill of their own motion, this in no way militates against the power of the prosecuting attorney to proceed as at common law by preparing a bill prior to the meeting of the grand jury, and having his witnesses subpoenaed and present at the meeting of court. While the custom in our courts is, perhaps, general for the prosecuting attorney to prepare only such bills as are directed by the grand jury, still Sec. 17 of Chap. 78, we think, clearly recognizes the practice we have alluded to, *i. e.*, that the bill should be prepared by, and upon the sole responsibility of the prosecutor, and submitted to the grand jury for their action thereon.

In this section, in speaking of the duties of the foreman, it is said: "and whose duty it shall be, when the grand jury, or any twelve of them, find a bill of indictment to be supported by good and sufficient evidence, to indorse thereon, 'A true bill;' when they do not find a bill to be supported by sufficient evidence, to indorse thereon, 'Not a true bill.'"

This common law rule of casting upon the public prosecutor the duty of preparing and bringing before the grand jury, bills for offenses against the criminal law together with the evidence to support them, is not only recognized but enforced by Sec. 5 of Chap. 14 of the Revised Statutes, which provides that the duty of the State's attorney shall be "To commence and prosecute all actions, suits, indictments and prosecutions, civil and criminal, in any court of record in his county, in which the people of the State or county may be concerned." It is thus by statute not only made his duty to prosecute all indictments when found, but he is to commence

them. As we understand this language, there is a criminal charge *in esse*, when the prosecuting attorney prepares a bill, sufficient at least to authorize him to have subpoenas issued for the witnesses to support it, whether before or after the grand jury is impaneled. And the universal practice having obtained in the courts of this State, so far as we are advised, of informally presenting a charge before the grand jury, without the formal preparation and presentation of a bill of indictment, we think the State's attorney, when he has reason to believe that an offense has been committed, may have subpoenas issued for the witnesses whose evidence he expects to present to the grand jury in support of the charge prior to the meeting of court.

In addition to the foregoing, it may be said that the grand jury has no independent existence, but is a part of and an adjunct to the court; that subpoenas for a witness directs him to appear, not before the grand jury, but before the court to give evidence before the grand jury, and by common law such witnesses were required to be sworn in open court and then sent before the grand jury to be examined. Bishop on Crim. Prac., Vol. 1, Sec. 868.

In the case of *U. S. v. Moore*, Wall. C. Ct. Rep. 28, it was held that a person charged with a crime may have compulsory process to compel the attendance of witnesses, even before indictment found, and it would seem that the people should have the same privilege. See also *King v. King*, 8 T. R. 585, where it is said: "A subpoena may be issued from the Crown Office requiring a witness to attend at the assizes in the country to give evidence in support of an *intended* prosecution for a felony; and this court will grant an attachment against him for not attending in obedience to the subpoena."

We find in appellant's brief a reference to Chitty's Crim. Law, Vol. 1, page 321, but we fail to see that it throws any light upon the question as to the *time* when a subpoena may issue.

Besides the foregoing reasons we think there are others of public policy tending to sustain the views herein expressed. It is the duty of the State's attorney to keep himself informed

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as to violations of the criminal law. Usually he has a general knowledge of most of the offenses that the grand jury ought to investigate and the witnesses by whom he expects to sustain the charge. In such cases what good reason can be given for waiting until the grand jury is impaneled before causing such witnesses to be subpoenaed. It frequently happens that the grand jury after their organization must remain idle at a heavy expense to the public, waiting for these witnesses to be sent for and brought in, whereas, if attending court, as they would be under the view we take of the law, the sittings of the grand jury would be materially shortened.

Again, if all the people's witnesses known to the State's attorney were served with subpoenas prior to the term of court, it could usually be performed by the sheriff with his ordinary force of deputies; but if done after the term begins it would require a large force of special bailiffs, thus needlessly enhancing the cost. If the law were to be held in accordance with the view of appellant, it would afford witnesses, who were for any reason anxious to avoid testifying before the grand jury and who had reason to suppose they would be compelled to do so, an opportunity of going beyond the jurisdiction of the court, and so remain during the few days that the grand jury might be in session, and thus entirely defeat the course of justice, not only for one but for as many terms of court as they might desire; for it must be remembered, that according to the law, as insisted upon by appellant, a subpoena for a witness to appear before the grand jury could only be issued during the sitting of such grand jury and returnable to the same session. We apprehend no evil results will flow from the practice of having the people's witnesses subpoenaed prior to the beginning of a term of court, but are inclined to think it will tend to aid in the enforcement of the law.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

SAMUEL H. CRUM

V.

CHARLES A. HIGOLD, ADMINISTRATOR, ETC.

Master and Servant—Physician's Services—Open Account—Limitations—Payment.

The mere fact of a payment by a debtor owing an account of a sum not more than sufficient to cover items of recent origin, without proof of knowledge as to numerous items of older date, long barred by the statute, is not sufficient, *per se*, to relieve such barred items therefrom.

[Opinion filed November 27, 1889.]

APPEAL from the Circuit Court of Morgan County; the Hon. C. EPLER, Judge, presiding.

Messrs. M. T. LAYMAN and G. W. SMITH, for appellant.

Mr. EDWARD L. McDONALD, for appellee.

WALL, J. This suit was brought by Higold, administrator of Craig, deceased, to recover a balance alleged to be due from Crum for medical services rendered him by the deceased Craig. The plaintiff recovered and the record is brought here by the appeal of the defendant.

We deem it necessary to consider only the defense of the statute of limitations, which was interposed by the defendant. It appeared that the account sued upon consisted of a large number of small items for attendance and medicines running through a period of twelve years, the major part of it having accrued more than five years before suit brought. There appears on the books kept by deceased, which were admitted in evidence, a credit of \$5 more than five years before suit brought, and several similar payments made since then, and as to these later payments it may be remarked that they were all made at times when, as shown by the books, there was a greater amount due considering only the items accruing within the five years.

At the instance of the plaintiff the court instructed the jury that if there was a running account between the deceased and the defendant extending through ten or twelve years before suit brought, and if payments were made by defendant for which he was credited by the deceased and the last payment was made within five years, then such payment would, in law, revive the whole account; and by a further instruction the court advised the jury that if defendant, after the account became barred, and within five years, made a payment on the account, then the account was thereby revived. The last instruction was misleading because it assumed there was a payment on account after it became barred, of which there was no proof. It was not shown that the payments made within the five years were made upon the old items nor that there was in a single instance any knowledge or recognition of an indebtedness greater than would be liquidated by the payment then made.

The first instruction seems to ignore the necessity of proof that the payment was intended to be made on the barred items or on a recognized general account but assumes that in the case stated mere payment made within five years would, as a matter of law, revive the whole account. While it is well settled that a part payment of a debt will take it out of the statute, yet it must be certain that the payment is made only as a part of a larger debt, for in the absence of proof it will not be deemed an acknowledgment of any more debt than it pays. *Parsons on Contracts*, 6th Ed., Vol. 3, 74-75; *Angell on Limitations*, Chap. 22.

Where a debtor owes several debts to his creditor and makes a payment it must appear affirmatively that he intended to pay upon the one barred before the payment can be made effective to remove the bar, and, as was said in *Lawry v. Gear*, 32 Ill. 386, it must be remembered that the new promise can be implied only where the party designedly makes payment upon the particular debt. There must be an actual, affirmative intention to make a payment on such debt before the new promise can be inferred. The rule is plain enough and easy of application when the debts are several and distinct, as in

the case of several promissory notes or other liabilities growing out of independent transactions. The case of a running account, such as here, consisting of a great number of similar charges, seems to present more difficulty.

In *Dyer v. Walker*, 54 Wis. 22, the court said that as the testimony was clear that the payment was made upon the account as a whole and not on any one or number of items, it would operate as an acknowledgment of the whole and remove the bar. In *Peck v. N. Y., etc., Steamship Co.*, 5 Bosw. 227, it was said: "The principle on which the effect of an indefinite payment on a general open account depends, is acknowledgment. A specific payment directly appropriated to a specific item in such an account leaves the statute to its operation as to the rest. But when the debtor knows that there exists against him a general account of items and designedly pays or furnishes something to lessen a demand on such general account without discrimination and at that time does not deny his liability for the previous items, the law reaches an implication of his acknowledgment of the whole account."

In *Beltzhoover v. Yowell*, 11 Gill & Johnson, 216, it was said: "Upon no principle of reason or justice can such an inference (of acknowledgment) be deduced from the simple fact of a payment made on account of a running account of long standing of which the debtor has never been furnished with a copy or been otherwise put in possession of a knowledge of the entries which it contained. * * * To revive the items of an open account which are barred by the statute, by a payment in part, or part payment on account, which are the same thing, it is necessary that it should appear that the payment was made on those items, or that the debtor, having full knowledge of the charges in the account to which the statute was a bar, made the payment recognizing its validity. The payment, too, must be applied by the debtor, not by the creditor. For although the creditor, on the omission of the debtor to do so, may apply the payment in part satisfaction of the debt or that part of it which is barred by the statute, yet such payment will not relieve the balance of the debt

from the operation of the statutes. *Mills v. Fowkes*, 35 Eng. C. L. R. 175."

In *Carroll v. Forsyth*, 69 Ill. 133, it was said: "Where one has an account against another, the whole or a part of which is barred by the statute of limitations, he can not take it all out by merely entering a credit. The credit to have that effect must be authorized and proved to have been intended as a payment on the account."

We are constrained to hold that the first instruction was erroneous in omitting as an essential element that the payment must be made under such circumstances as to show a recognition of the whole account—a purpose to pay on the stale items. The mere fact of a payment not more than sufficient to cover items of recent origin without proof of knowledge as to the numerous items of older date, now long barred by the statute, ought not to be sufficient *per se* to relieve such barred items from the statute. The gross injustice which might thereby be accomplished, is apparent. Nor can the barred items be saved on the ground that the present is a case of mutual accounts. The rule that items within the period of limitation draw after them items beyond that period, is strictly confined to mutual accounts between two parties showing a reciprocity of dealing. There must be a mutual or, as sometimes expressed, an alternate course of dealing, giving rise to cross-demands upon which the parties might respectively maintain actions.

Where payments are made on account by one party for which credit is given by the other, it is an account without reciprocity and only on one side. The mere payment credited by the plaintiff does not bring the case within the exception of mutual accounts. *Angell on Limitations*, Secs. 148-9; *Wait's Actions and Defenses*, Vol. 7, 266-7.

We are of opinion that upon the evidence, as it appears in the present record, the defense of limitations was well made as to a substantial portion of the account.

For the reasons indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

INDIANAPOLIS & ST. LOUIS RAILWAY COMPANY
V.
THE PEOPLE, FOR USE, ETC.

*Railroads—Obstruction of Highways—Pleading—Statutory Penalties—
Liability for—Secs. 63-4, Chap. 114, R. S.*

1. In an action under Secs. 63-4, Chap. 114, R. S., providing penalties for the obstruction of highways by railroad corporations in leaving locomotives and cars at intersections thereof, it is unnecessary to allege that the corporation in question is the owner of the railroad.

2. Such corporation is liable, under Sec. 64, for the penalty provided therein for each offense alleged and proved in the action, the same as in the case of an engineer or conductor.

[Opinion filed November 27, 1889.]

APPEAL from the Circuit Court of Montgomery County;
the Hon. J. J. PHILLIPS, Judge, presiding.

MESSRS. JOHN T. DYE and AMOS MILLER, for the appellant.

MESSRS. LANE & COOPER, for appellee.

WALL, J. It is provided by Secs. 63 and 64 of Chap. 114, R. S., as follows:

"Sec. 63. No railroad corporation shall obstruct any public highway by stopping any train upon, or leaving any car or locomotive engine standing on said track, where the same intersects or crosses such public highway, except for the purpose of receiving and discharging passengers, or to receive the necessary fuel and water, and in no case to exceed ten minutes for each train, car, locomotive or engine."

"Sec. 64. Every engineer or conductor violating the provisions of the preceding section shall for each offense forfeit the sum of not less than \$10 nor more than \$100, to be recovered in an action of debt in the name of the people of the State of Illinois, for the use of any person who may sue for

the same, and the corporation on whose road the offense is committed shall be liable for the like sum."

The present action was brought against appellant to recover for forty-six alleged violations of the section first quoted. The Circuit Court overruled a demurrer to the declaration and appellant declining to make further answer, proceeded to hear evidence, and finding the appellant guilty on twenty-six counts, rendered judgments for ten dollars on each of said counts.

Two points are made by the brief of the appellant: 1st, that the declaration is bad in not averring that appellant was the owner of the railroad; 2d, that appellant is liable, if at all, for only one penalty and not for each offense committed.

As to the first objection, the averment is that "the defendant, then operating a certain railroad" (the one in question) "did propel and drive a locomotive engine and cars on the said railroad and did obstruct a certain highway named, for a greater space of time than ten minutes," etc., each count containing a similar averment. It is urged that by this allegation it does not sufficiently appear that "the defendant is the corporation on whose road the offense was committed."

The section first quoted declares that no railroad corporation shall obstruct any public highway, etc., etc., and the following section fixes the penalty. Manifestly the object of the latter section is to provide a punishment for the offense described in the former and to lay that punishment upon those committing the offense, the principal as well as the agent.

To prove that a certain corporation was operating the road when the offense was committed would be ample evidence of its liability.

Reading the two sections together we are of opinion that it is not necessary to aver or prove that the defendant *owned* the road, but that the fact of defendant operating the road makes defendant, for the purpose of this enactment, "the corporation on whose road the offense is committed." Such a corporation might well speak of the road as *its* road, and the road might well be referred to as the road of that corporation. The language here used is to be taken in its

general sense and to have reference to the expression in the first section that "no railroad corporation shall obstruct," etc.

In the case of Ill. C. R. R. Co. v. Kanouse, 39 Ill. 272, it was held that a lessee corporation was subject to the provision of the statute requiring railroads to fence their lines, and it was said of such lessees that *pro hac vice* they must be deemed the owners. The statute then under consideration provided : That every railroad corporation *whose* line of road or any part thereof is open for use shall * * * and every railroad company formed or to be formed but *whose* lines are not now open for use," etc. Gross' Stat., 539. The language here employed is, as to the point in question, quite identical with that of the section now involved. In view of the plain object of the legislation and of the terms used we think the objection to the declaration was properly overruled. Linfield v. Old Colony R. R. Co., 10 Cush. 562.

The second point turns upon the construction of the last clause of the second section, which declares that the principal "shall be liable for the like sum." These words are in the same sentence with and clearly refer to the provision that "for each offense (the engineer or conductor) shall forfeit the sum of not less than \$10 nor more than \$100." "The like sum" is an equivalent expression for what precedes, set forth in detail, and refers to the matter for which the liability is imposed, viz., "for each offense;" which liability is also imposed upon the corporation on whose road the offense is committed.

It was intended to punish the principal equally with the agent, and it would be a narrow and unfair construction to hold under this expression that whereas the agent should be liable for each offense, the principal is liable but for one or rather for only one penalty for all offenses. The natural meaning and import is to hold the agent and the corporation each liable to the same punishment for every violation of the act.

In the case of T. W. & W. Ry. Co. v. The People, etc., 81 Ill. 141, the railroad company was prosecuted for twenty-five

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alleged violations of the act under consideration. There it was contended these words, "the like sum," must refer to a sum certain actually adjudged against the offending servant, and that a conviction of the servant was a necessary prerequisite to a conviction of the company; but this view was not accepted by the court, and it was said that it was the intention to subject the conductor, engineer and corporation indifferently to the fine prescribed for violating the act, and that the corporation should be liable for the like sum for which the engineer or the conductor was liable. That case, while not deciding the precise point at issue, is in harmony with the position of the appellee in the present case.

If there were but a single offense, the servant and the company would of course be liable; but it would hardly be supposed that a conviction for such offense could be pleaded in bar of a prosecution for a subsequent offense or that a conviction for the second offense would preclude liability for a third. Yet, according to the construction contended for, if several offenses occurred before suit brought, even though happening so close together that separate suits would be impossible, but a single penalty could be inflicted upon the company, though the servant would be liable for as many penalties as there were offenses. Such a construction is forced and unnatural, would lead to results not intended by the lawmaker, and, in many instances, would defeat the object of the law.

The judgment will be affirmed.

Judgment affirmed.

PATIENCE E. WARD

v.

JOHN WOOD ET AL.

Administration—Debts—Bill to Subject Assets of Deceased Debtor to Payment of—Assets—Legal in Part—Demurrer.

Upon the filing of a bill to subject certain assets of a deceased person to the payment of debts, it clearly appearing that a portion thereof could have been reached by legal remedies, and there being no allegation as to the value of such portion, it will be presumed that they were sufficient to pay the debts in question.

[Opinion filed December 3, 1889.]

APPEAL from the Circuit Court of Adams County; the Hon. C. J. SCOFIELD, Judge, presiding.

Messrs. BERRY & EPLER, for appellant.

Mr. WILLIAM McFADON, for appellees.

WALL, J. This was a bill in chancery by a creditor of a deceased debtor to subject certain assets of the debtor to the payment of the indebtedness held by the complainant, as well as that due other creditors. A demurrer was sustained to the bill and there was final judgment dismissing the bill and for costs, accordingly. The complainant brings the record here by appeal and assigns error upon said ruling.

The assets referred to in the bill consisted mainly of the unsold and unaccounted for proceeds of a tract of thirty-three and one-fourth acres of land conveyed by the debtor to the city of Quincy, under an act of the General Assembly, for cemetery purposes. It was the theory of the bill that by the facts therein stated the city became the trustee of the debtor as to three-fourths of the property so conveyed, and that for the reasons set forth the aid of a court of equity was indispensable, and that the complainant was entitled to relief in that forum.

Assuming that as to such property there was a condition of things not within the power of the County Court adequately to manage, and calling in an especial manner for the peculiar modes of relief employed in chancery, and that the omission to probate the claim should not, under the circumstances prejudice the complainant as to this fund, there is another aspect of the case requiring consideration.

The bill further averred (we quote from the statement in appellant's brief) that, "On January 28, 1857, an act was passed by the Illinois Legislature amending the act of January 16, 1847, authorizing John Wood to lay out and add to Woodland Cemetery four and sixty-five one-hundredths acres, lying south of it, and which was to be covered by the provisions of the original act. That John Wood inclosed the east part of said four and sixty-five one-hundredths acres as a part of Woodland Cemetery, but as complainant is informed and believes, he never conveyed it to the city of Quincy, nor to any one else, save about one-tenth of an acre which he deeded to Joel Price in 1854."

The bill further states, that "said four and sixty-five one-hundredths acres extend to Front street, but the western limit of the inclosure is a fence; that John Wood platted block 15 in said addition into lots, which addition also includes about half of block 16; that lots in said blocks were sold by John Wood during his life, and afterward by the city, and their proceeds disposed of as that of other lots in the cemetery as aforesaid; that a part of said addition has not been platted into lots, which, together with many lots in block 15, and the south half of block 16, remain unsold; that the part of said four and sixty-five one-hundredths acres lying west of said fence, the western boundary of said addition, except the piece sold to Price, remains unsold, and part of the assets of the estate of said John Wood, deceased, not accounted for by said administratrix, as do also the unsold portions of said addition platted into lots or not so platted, as do also three-fourths of the proceeds of the unsold portions of said thirty-three and one-fourth acres."

It is not averred what was the value of the residuum of said tract of four and sixty-five one-hundredths acres, but clearly it still stands in the name of the debtor, and is a legal, as contradistinguished from an equitable estate. No reason appears why the complainant could not reach this property, and as the bill fails to disclose its value, it may fairly be presumed it was sufficient to pay the debt of complainant and indeed, all the debts of the deceased. As to this there was

ample power in the County Court. The mere fact that the property was not inventoried and that the administratrix was discharged before completely performing her official duty, would not prevent complainant from availing of her legal remedy. As it is to be presumed in the absence of an allegation to the contrary, that the property was sufficient to cover the claim, and that by means thereof payment might have been enforced in the County Court, it follows there was an adequate remedy at law, and therefore no occasion to invoke the interposition of chancery. *Blanchard v. Williamson*, 70 Ill. 647. It is not averred that as to the thirty-three and one-fourth acres there was any fraud, but merely that by reason of the facts there was a trust estate—an equitable interest—to which complainant desired to resort. According to well settled rules, this could be done only in default of legal assets.

The decree dismissing the bill will be affirmed.

Decree affirmed.

LAKE ERIE & WESTERN RAILROAD COMPANY

v.

JOHN S. SCOTT.

Railroads—Injury to Private Property through the Construction of—Damages.

1. An owner of real estate located upon a highway, is entitled to damages when the same is rendered less safe with reference to communication with his property, through the building and operation of a railroad contiguous thereto.

2. There is no legal distinction between damages suffered in such manner and where the injury arises from the obstruction of the road itself.

3. In such cases certain elements of damage arise, so far as such property owner is concerned, which are not fully shared by the general public.

[Opinion filed December 13, 1889.]

APPEAL from the Circuit Court of McLean County; the Hon. OWEN T. REEVES, Judge, presiding.

Messrs. STEVENS & HORTON and JAMES S. EWING, for appellant.

There can be no recovery where the elements of damage are speculative and imaginary, such as the danger of having horses frightened, or offensive to a sensitive taste, such as the unsightliness of an object, lawful in itself. *McReynolds v. B. & O. R. R.*, 106 Ill. 152; *P. & P. U. Ry. v. P. & F. Ry.*, 105 Ill. 110; *Stone v. P. & N. W. R. R.*, 68 Ill. 394; *Cooper v. Randall*, 53 Ill. 24; *In re Penny*, 7 El. & Bl. 660; *Favor v. Boston R. R.*, 114 Mass. 350; *Cooley on Torts*, p. 602.

There can be no recovery under our present constitution where the injury suffered is of the same kind as that suffered by the public. *Chicago v. Union Building Ass'n*, 102 Ill. 379; *East St. Louis v. O'Flynn*, 119 Ill. 200; *McDonald v. English*, 85 Ill. 232; *Guest v. Reynolds*, 68 Ill. 478; *I. B. & W. R. R. v. Eberle*, 110 Ind. 542; *Roebette v. C., M. & St. P. R. R.*, 17 A. & E. R. R. Cas. 192; *Rude v. City of St. Louis*, 6 S. W. Rep. 257.

There can be no recovery, unless, under the facts, the damage complained of would give rise to a right of action at common law. *Rigney v. Chicago*, 102 Ill. 64; *Chicago v. Un. Building Ass'n*, 102 Ill. 379.

But a railroad operated by authority of law and for a lawful purpose is not a nuisance. *C. & E. I. R. R. v. Loeb*, 118 Ill. 203; *I. C. R. R. v. Garbill*, 50 Ill. 241.

And the acts complained of, viz., mental disquietude and inconveniences in mere matters of taste are not actionable. *Cooper v. Randall*, 53 Ill. 24; *Guest v. Reynolds*, 68 Ill. 478; *Cooley on Torts*, p. 598-602; *Owen v. Henman*, 1 Watts & S. 548; *Sparhawk v. U. P. R. Co.*, 54 Pa. St. 401.

Nor is operating the railroad an actionable offense merely because there is a liability to frighten teams. *Favor v. Boston R. R.*, 114 Mass. 350; *P. W. & B. R. R. v. Stinger*, 78 Pa. St. 219; *Macomber v. Nichols*, 34 Mich. 21; *Stone v. F. P. & N. R. R.*, 68 Ill. 394; *Hahn v. Southern Railway*, 51 Cal. 605; *Cooley on Torts*, p. 617.

Hence, under the facts in this case, if plaintiff is damaged

at all, it is *damnum absque injuria*. Penn. R. R. Co. v. Lipincott, 9 At. Rep. 871; Penn. R. R. Co. v. Marchant, 13 At. Rep. 690; Trinity & S. Ry. v. Meadows, 11 S. W. Rep. 145; Boseman v. Penn. R. R. Co., 13 At. Rep. 164; Renard v. B. & W. Ry. Co., 23 N. W. Rep. 914; Florida Southern Ry. Co. v. Brown, 1 So. Rep. 512; Rude v. City of St. Louis, 6 So. W. Rep. 257; In re Penny, 7 El. & Bl. 660; Caledonian Ry. Co. v. Ogilvy, 2 Macg. 229; Ricket v. Metropolitan Ry. Co., L. R., 2 H. L. 175.

Messrs. R. B. WILLIAMS and I. N. PHILLIPS, for appellee.

CONGER, J. Appellee owns a farm of about 216 acres, bounded on the west by a public highway sixty-six feet wide, running from the city of Bloomington in a northerly direction, known as the White Oak Grove Road. The whole of the farm lies east of this highway, except at one point where a corner of one of the tracts composing the farm crosses the highway, making a small triangle containing from three to six one-hundredths of an acre on the west side of such highway.

Appellant's railroad was located and constructed in the middle of its right of way, which was one hundred feet wide, lying west of and adjoining the White Oak Grove Road. The railroad was separated from the farm by the highway, except where it touched the little triangular piece lying west of the highway.

In constructing the railroad at this point a cut was made and a portion of the earth on this triangle was dug away and removed. Appellant took no steps to have this land condemned; when the sub-contractor was grading at this point, appellee notified him not to go upon this triangle as it was his property, and the right of way had not been secured over it. In explaining their action appellant's counsel say: "Upon investigation it appeared so small and trifling, the sub-contractor was advised to go ahead with his work, and that the railroad company would settle with appellee." No settlement, however, was made, and appellee instituted the present suit.

The amended declaration upon which the case was tried

was in the nature of an action on the case, in which damages were claimed for the trespass and excavation upon the triangular piece lying west of the highway, and for damages to all the land lying upon the east side of the highway. In the declaration it is averred that by reason of defendant entering upon and digging up and carrying away the soil and earth from plaintiff's land, and by reason of defendant constructing its said railroad as above stated, so near to said highway and so near plaintiff's land, and continuing to operate the same, defendant thereby became liable to pay to plaintiff all damages that the construction and operation of its said railroad will cause or has caused, to the residue of said body of land, not in fact entered upon and despoiled. It is then further averred, the construction and operation of said railroad, in the manner and way it is constructed and operated, will and does greatly injure the rest of said body of land, not entered upon and despoiled in this: that it makes, and will through all coming time while such lands are used for farming purposes, the approach to and from the dwelling house and the other buildings on the west side of said lands over said highway, unsafe and dangerous to travel on and over in carriages or other vehicles drawn by horses or other animals; that the deep cut and high embankment immediately in front of and near plaintiff's land, makes the appearance of such farm unsightly, and otherwise injuriously affects it; and that the construction and operation of said railroad, as aforesaid, renders said farm less convenient and comfortable as a place of residence, and also renders such lands less safe and convenient for farming purposes, particularly in handling stock upon it. It is then averred that "by reason of the wrongful acts and doings of defendant, as aforesaid, and the injuries done to plaintiff's lands, as aforesaid, the salable value of said land is thereby greatly decreased."

Pleas were filed by appellant, a trial had before a jury, who returned a verdict for appellee in the sum of \$500, upon which judgment was rendered. There can be no question that appellee was entitled to recover damages occasioned by the entering upon and removing or distributing the soil upon

the premises west of the highway, but it is strenuously insisted that for such damages to the remainder of the farm as are claimed in the declaration, there can be no recovery.

The evidence was conflicting. Appellee's witnesses testified that the construction and operation of the road would damage appellee's farm to the extent of \$6 to \$10 per acre, decrease its rental and salable value; while the witnesses for appellant think there would be no substantial damage. Under these circumstances the jury were warranted in their verdict, if the law as applicable to the case was properly applied. The instructions given appellee upon this subject were as follows:

"2. The court instructs the jury on behalf of plaintiff that the true measure of compensation, where no land is taken for the right of way for a railroad upon which to construct a road bed and track is the difference between what the whole property would have sold for, unaffected by the railroad, and what it would sell for as affected by it.

"3. The constitution of this State declares: 'Private property shall not be taken or damaged for public use without just compensation,' and the jury are instructed it will be presumed the framers of that instrument used the word 'damaged' in that connection in its ordinary and popular sense, which is hurt, injury or loss, and that 'the damage contemplated by the constitution' in cases where no land is actually taken, 'must be an actual diminution of present value or of price, caused by constructing and operating the road, or a physical injury to property that renders it less valuable in the market if offered for sale.'

"4. If the jury believe from the evidence that plaintiff is the owner in fee simple of the land described in the declaration, and that the defendant railroad company in constructing its road bed and track entered upon any portion of plaintiff's said land and dug up and carried away the soil, and that such acts were a physical injury to such lands or any part thereof, and if the jury further believe from the evidence the construction of defendant's road bed and track along, near and adjacent to plaintiff's land, and its contemplated maintenance and operation, if the jury believe from the evidence they are

so constructed, and that defendant intends to maintain and operate the same, are an actual damage to his lands and do in fact render the same less valuable in the market if offered for sale, then the law is for plaintiff, and the jury should find for him; and the jury are instructed as a matter of law plaintiff is entitled to recover for any depreciation—if the jury believe from the evidence there has been any depreciation—in the market value of plaintiff's lands not actually entered upon by reason of the construction, maintenance and operation by defendant of its railroad as constructed, and also for any physical injuries done to that portion of plaintiff's land upon which defendant did actually enter—if the jury believe from the evidence defendant did enter upon any portion of plaintiff's lands described in the declaration and did cause any physical injuries to the same.

"5. The jury are further instructed on behalf of the plaintiff that in determining whether plaintiff's lands are lessened in value by reason of the construction and the proposed operation of the railroad, then the jury may consider the injury to plaintiff's lands, if any is proved, arising from the inconveniences actually brought about and occasioned by the construction of defendant's railroad, although such damage might not be susceptible of definite ascertainment; and may also consider such incidental injury as the proof may show might or would result from the perpetual use of the track for moving trains, or from the inconveniences in using said lands for farming purposes and in handling stock upon it, if the proof shows such railroads would occasion any such inconveniences; and they may consider generally such damage as the evidence may show, if any are reasonably probable to ensue from the construction and operation of defendant's said railroad."

Witnesses for appellee seem to base their idea of the damages upon the supposition that the construction and operation of the road so near the highway has rendered it dangerous and unsafe to travel upon, made the egress and ingress from the farm onto the highway with teams and stock more dangerous, rendering the farm less safe and convenient, and thereby reduced the value of appellee's farm.

Appellant insists that in all this evidence, "appellee has shown no injury or damages not suffered in common with the general public, for which the law affords him no redress."

We can not assent to this view. The damages spoken of by the witnesses in reference to making the highway more dangerous are, to some extent, shared with appellee by the public, and in so far as they are common to both no right of action exists. But there are elements of damage affecting the value of appellee's farm which do not in any way affect the public. A highway beside a farm may and generally does give it an increased value, depending to some extent upon the location of the buildings, and the character and degree of use the owner may have for such highway. In so far as its use is interfered with, or destroyed, the value of the farm is lessened, and for that the owner should recover, for he sustains some special pecuniary damages in excess of that sustained by the public generally.

But it is urged that the damages claimed arise, not from any physical invasion or disturbance of appellee's property, or actual encroachment upon the highway, but alone from the injury to the use and enjoyment thereof caused by the operation of the railroad; that such operation being lawful and confined to appellant's right of way, the damages arising therefrom to appellee would be *damnum absque injuria*. We admit there is force in this suggestion, and so far as we are aware this precise question has not been passed upon by the Supreme Court. The nearest approach to it is in the case of *Rigney v. City of Chicago*, 102 Ill. 64, where there was no direct interference with the premises of Rigney, but an obstruction placed in the street at a distance therefrom, thereby injuring the use of the street, or, as stated in the opinion, "it is not pretended or claimed that the plaintiff's possession has been disturbed, or that any direct physical injury has been done to his premises by reason of the obstruction in question. The gravamen of the plaintiff's complaint is, that the defendant, in cutting off his communication with Halsted street by way of Kinzie street, has deprived him of a public right which he enjoyed in connection with his premises, and

thereby inflicted upon him an injury in excess of that shared by him with the public generally, and it is for this excess he seeks to recover, and nothing more;" and the court says: "If the lot and buildings of appellant are to be regarded as property, and not merely the subject of property, as, strictly speaking, they are, then there has clearly been no physical injury to it; but if by property is meant the right of user, enjoyment and disposition of the lot and buildings, then it is evident there has been a direct physical interference with appellant's property, and when considered from this aspect, it may appropriately be said the injury to the property is direct and physical."

We are inclined to think there is no good reason for distinguishing between an injury arising from an interference with appellee's right to the advantages the highway gave his farm, caused by a physical obstruction placed therein, as in the foregoing case, and where the same kind of an injury is produced by the operation of trains beside it. In either case the advantages given the farm by the highway have to some extent been destroyed, and the land lessened in value.

If it be conceded that the result of operating the road has in fact injured appellee's farm in a way not common to the public and thereby made it less valuable, it would seem to follow as a necessary consequence, that it has been damaged for public use. Such operation being lawful, and confined to the right of way, does not release appellant from liability, for it would clearly be liable for damages caused by an unlawful act, and, as we understand the constitutional provision that private property shall not be taken nor damaged for public use without just compensation, it means to cover cases where damages are caused by acts that are legal and entirely within the powers of the corporation performing them, but in the doing of which for the use and benefit of the public, private property is damaged. It follows, therefore, that appellant's proposition that "a corporation is not liable unless an individual doing the same thing on his private property would be," as applied to this case, is not sound.

An individual can not legally take or damage private prop-

erty for public use, but a railroad company can lawfully do either, if, in so doing, it makes compensation.

It has been suggested that if this recovery can be sustained, it would authorize repeated suits, upon the theory that a new injury is caused by every passing train, thus giving ground for successive actions. This is a misapprehension of the true grounds upon which the right of recovery rests. The damage to appellee is caused by the construction of the road in such place, as the proper and only way of operating it did of necessity from that time, injure the farm and lessen its value. It is the right which appellant has, at its pleasure and for all future time to operate its trains, that at once depreciates the value of the farm, and not the effect produced by the passing of particular trains or any particular injury or accident that may occur to appellee's property therefrom; hence, the damages arose at the time of the construction of the road, and were then capable of being determined once for all.

Believing that this view of the law is within the spirit and meaning of the constitutional provision alluded to, and has been fairly applied by the court below, the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

BOARD OF EDUCATION, ETC.,

V.

FRANK HELSTON, WHO SUES BY, ETC.

Schools—Mandamus—Pupil—Suspension of—Reinstatement—Department—Correction of Confessed Error by Amendment after Appeal—Costs.

1. Upon a judgment awarding a writ of *mandamus* to compel a board of education to reinstate a pupil in a public school, it is *held*: That the granting of costs against the board, with the award of execution therefor, was error, and that, although such error was corrected by amendment in the court below, after the record had been brought here on appeal, yet the costs of the appeal must go against the appellee.

2. The suspension of a pupil until he shall comply with the requirements of the board can not be construed to extend beyond the current school year.

Board of Education v. Helston.

3. One who is improperly excluded from the common schools sustains an injury which the law will redress, but the enjoyment of the rights thus furnished by the State at public expense is necessarily conditioned upon that degree of good conduct on the part of each, which is indispensable to the comfort and progress of others.

4. It is within the discretion of the board to require a pupil to inform the board of the name, given to him by another pupil, of a party who had been guilty of a gross breach of rules, and, upon his refusal, to suspend him.

5. By gross profanity and vulgarity to the board, the pupil forfeits his right, if any, to reinstatement.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Montgomery County; the HON. J. J. PHILLIPS, Judge, presiding.

Mr. EDWARD LANE, for appellants.

It will not be disputed by any one that the board of education have ample power to make all necessary and reasonable rules and regulations for the government of schools under their charge. What are reasonable rules is a question of law. *Thompson v. Beaver*, 63 Ill. 353.

The request of the superintendent of the school and committee in this case was reasonable, and after they had exhausted all reasonable means to induce the plaintiff to give the name of the boy in question, they had the right to suspend him from the school until he would comply with the request, and simply by complying with the request he was at liberty to return to the school at any time. *Spiller v. Inhabitants of Woburn*, 12 Allen, 127; *Hodgkins v. Institute of Rockford*, 105 Mass. 475; *Russell v. Inhabitants of Lynnfield*, 116 Mass. 365; *State v. Webber*, 108 Ind. 31; *Gertich v. Michener*, 111 Ind. 472; *Ferriter v. Tyler*, 48 Vt. 444; *State v. Burton*, 45 Wis.¹⁵⁰; *Donahoe v. Richards*, 38 Me. 379; *Guerency v. Pitkin*, 32 Vt. 324; *Lander v. Seaner*, 76 Am. Dec. 156; *State v. Pendergrass*, 31 Am. Dec. 416; *Sewell v. Board of Education*, 29 Ohio St. 89; *Burdick v. Babcock*, 31 Ia. 562; *Stephenson v. Hall*, 14 Bar. 222; *King v. Jefferson, etc.*, 71 Mo. 628; *Bateman, Com. School* Dec. 207; 18 Am. Law Reg. 533; 20 Am. Law Reg. 794; 3 Central Law J. 700; 21 Central Law J. 26.

Boards of education are held by the courts to be *quasi* judicial, and their decision is final, unless it appears that they acted from malice or ill-will. If they exercise their powers in good faith their decisions will not be reversed by the court. *Hodgkins v. Rockford*, 105 Mass. 475; *State v. Barton*, 45 Wis. 150; *Graves v. Inspectors*, 20 Ill. 541; *McCormick v. Burt*, 95 Ill. 265.

The board has discretionary powers in regard to making needful rules for the government of the school, and *mandamus* will not compel them to act differently. *Will County v. The People*, 110 Ill. 511; *The People v. Commissioners*, 118 Ill. 239; *The People v. Hyde Park*, 117 Ill. 462; *People v. McCormick*, 106 Ill. 184.

It is only when discretion is abused that *mandamus* will lie. The gentlemen composing this board being men of common sense, learning and ability, with a full knowledge of all the facts, without malice or ill-will, did what they thought was for the best interest of this pupil as well as the whole school, and I respectfully submit, if their acts do not counter-view any known principle of law, the court will accept the judgment of the matter "as the general judgment of reasonable men," and permit them to govern this school in harmony with such reason.

MESSRS. GEORGE PEPPERDINE and JAMES M. TRUITT, for appellee.

In *mandamus* proceedings malice or ill-will do not have to be proved. This is a proceeding for a *mandamus* to compel appellant to admit appellee to the schools of the district. By this proceeding the court is asked to review appellant's treatment of the boy, and if appellant is wrong, order the boy to be restored to school.

Where it is sought to hold the members of the board individually liable in damages, then malice must be averred and proved. But in the case at bar appellee only asks the judgment of the court on the reasonableness of appellant's conduct, and he is entitled to that judgment without any presumption being indulged by the court for or against appellant.

The distinction we insist on is clearly laid down in the case of *Dritt v. Snodgrass*, 66 Mo. 286.

The case of *Murphy v. The Board of Directors*, 30 Iowa, 430, was a similar proceeding to the case at bar. But our own court has passed satisfactorily upon the question. *Trustees of Schools v. The People ex rel.*, 87 Ill. 303; *The People ex rel. v. Board of Education*, 127 Ill. 613; *The People ex rel. v. Board of Education*, 101 Ill. 308, Judge Walker's dissenting opinion, on page 321.

We concede that ordinarily the courts will refuse to direct how a discretionary act shall be performed, but will only compel the body to act. But we are satisfied that the proceedings of appellant can not be sustained by that proposition. In the cases of the *Trustees of Schools v. The People ex rel.*, 87 Ill. 303, and *The People ex rel. v. Board of Education*, 127 Ill. 613, our Supreme Court sustained *mandamus* proceedings and passed upon the action of the school officers without being troubled about the discretionary power of such officers to act. If such officers act right, the courts will sustain them; but if they act wrong, the courts will, notwithstanding their supposed discretionary power, correct the wrong.

It was never intended to make them the absolute judges of the lawfulness of their proceedings. *Ferritor v. Tyler*, 48 Vt. 412; *Cotton v. Reed*, 20 Ill. 607; *State v. Board of Education*, 63 Wis. 234; S. C., 53 Am. Reps. 282; *State v. White*, 82 Ind. 278; *Murphy v. The Board of Directors*, 30 Iowa, 430; S. C., 27 Am. Reps. 348; *Dritt v. Snodgrass*, 66 Mo. 286; *Morley v. Power*, 12 Central Law Journal, 510.

WALL, J. This was a proceeding by *mandamus* to compel the Board of Education of District No. 1, T. 8, etc., to restore the relator to the privileges of a pupil in the public school of said district.

A demurrer was sustained to the amended answer, and there was judgment for a peremptory writ as prayed, with costs, and an award of execution therefor. The record having been brought here by appeal of the board, the appellee moved the court below to amend the judgment by striking out the award of execution for cost which, as appears by the additional record

now filed, was done. Thus a confessed error has been corrected, but the cost of the appeal must fall upon the appellee as the judgment would necessarily have been reversed because of such error. *Shibly v. Spencer*, 40 Ill. 107; *Saely v. Pelton*, 63 Ill. 105.

It appears from the record that the relator was suspended from the school November 9, 1888, until he would comply with the requirements of the board. This suspension would not be construed to continue beyond the school year then current, and as that year has now expired the relator presumably is not now debarred of school privileges. The only point having legal significance remaining in the record is as to the costs in the court below which were adjudged against the board. To determine the propriety of that judgment it will be necessary to consider the facts presented by the pleadings.

The petition avers that the relator is fourteen years of age and a resident of said district, and had been in attendance as a pupil in the school; that on the 9th of November, 1888, he was illegally suspended because he had refused to give to the superintendent the name of another pupil whom he (relator) thought was guilty of defacing the school building by obscene writing thereon. The answer admits the relator was a pupil and that he was suspended, alleges that some obscene writing (setting it out) very gross and in such large letters as to be legible across the street was found upon the building, and that relator was asked, as were other pupils, what he knew about it, and that he told the superintendent and the school committee that another boy had given him the name of the boy who did it, but he refused to give the name of the boy, for which disobedience he has been suspended until he would give the name, or say that the name had not been given to him, which suspension was by the board approved. That afterward, in February, 1889, the relator appeared before the board, and still persisting in his refusal to tell what he knew, though modifying somewhat, but not materially, his former statement as to the nature of the information he possessed, he was requested by the board to ask his mother to come there so that the board might confer with her about the matter, which he in very

insolent terms refused to do, and then applied the most profane and obscene epithets to the board and went away. The expressions used by him on that occasion are set out in the answer, but on account of their indecency are omitted here.

It is true, as suggested by counsel in argument, that the common schools are provided and maintained by taxation, that their benefits are rightly to be enjoyed by all, and that one who is improperly excluded sustains an injury which the law will redress. But the enjoyment of the right thus furnished by the State at public expense is necessarily conditioned upon that degree of good conduct on the part of each which is indispensable to the comfort and progress of others.

As in all other forms of social life, the individual must surrender a certain measure of his natural independence and must submit to be governed by those rules which have been found necessary; and very much as in the family, there is absolute necessity for strict obedience to all reasonable requirements of those who are in authority. The ordinary laws of decency and propriety in conduct and in speech can not be disregarded, and when broken there must be prompt and effective punishment, otherwise the great objects of the school will fail of accomplishment. It need not be argued that the defacement of a public school building by obscene writing thereon is an intolerable offense and that the most radical measures should be resorted to, if necessary, to prevent a repetition of it. It is the duty of all good citizens to uphold the officers of the law and when called upon by a grand jury every man may be required to state upon oath what he may know as to the perpetration of any crime or misdemeanor, though he is, of course not bound to criminate himself.

So here every pupil, when called upon by the superintendent or by the board, should, as a matter of duty and loyalty to what is essential for the common welfare, freely state anything within his knowledge not self-criminating, that will assist in bringing the offender to justice and thereby tend to the repression of all such offenses.

If he refuses to do this he is guilty of disobedience, for which reasonable punishment may be inflicted. By the pro-

visions of the school law, Secs. 49, 83, the board may suspend or expel a pupil for "gross disobedience or misconduct."

We shall not discuss the question whether the decision of the board in such a case is so far judicial in its nature and so much within their discretion as not to be the subject of review in legal proceedings, but shall assume that the law may and will, in proper cases, set aside such decisions and grant appropriate relief where manifest wrong and injustice appear. It is to be conceded, however, that the case must be clear, and that much must be presumed in favor of the action of the board and much should be left to their discretion. The duty of a school teacher and of school directors is to a great extent parental, and in the administration of their power they must be guided by wise judgment. Many circumstances and considerations not easily stated on paper, may properly influence their action. Insubordination in a large public school is dangerous in the extreme. Firmness and decision may often be essential to good order, and the timely and prompt correction of a few turbulent spirits may be absolutely necessary to prevent the further spread of misrule. When done in good faith such acts should receive very favorable consideration in the courts.

In this case, upon the facts disclosed by the answer, the board was clearly warranted in suspending the relator. He was guilty of gross disobedience in refusing to furnish what information he had when called on for that purpose. For such refusal of a witness to testify before a grand jury or upon a trial he may be fined and imprisoned.

By his misconduct, when before the board in February, the relator forfeited all rights to reinstatement until suitable reparation therefor was tendered.

It would be unwise and unreasonable to open the door of the court to one so forgetful of duty and so wanting in the respect due from a youth to his superiors in age and authority. Here is a boy of fourteen who has defied the proper command of his school superintendent and who has been guilty of an outrageous breach of decorum toward the board, who were for the time being his judges, asking the law

J. S. Ry. Co. v. Southworth.

to reinstate him as a pupil. If he could succeed under those circumstances, the power of the superintendent and the board would justly be regarded as very insignificant and the influence of the example would be exceedingly unfortunate.

The extraordinary remedy by *mandamus*, which is to be invoked only in clear cases, and which is dependent upon a sound judicial discretion, should not be granted upon the facts set forth in the pleadings. It was error to sustain the demurrer to the amended answer. The judgment will be reversed and the cause remanded.

Reversed and remanded.

THE JACKSONVILLE SOUTHEASTERN RAILWAY
COMPANY

V.

ELIZUR SOUTHWORTH.

Railroads—Personal Injuries—Pass—Gross Negligence—Evidence—Instructions—Examination of Jurors—Special Interrogatories.

1. In an action against a railway company to recover damages for an injury received by a person while riding on its road upon a complimentary pass, it is *held*: That a question to a juror by plaintiff's counsel as to whether, if it should appear in evidence that the plaintiff, when he received the injury, was riding on a pass, that fact, would influence his verdict in the case, was not material error.

2. A question to which no objection was made in the trial court can not be considered here.

3. Where evidence tends to show a company's track to have been in the same condition shortly before and after the accident occurred, it raises a presumption that it was in such condition at the time thereof; and such evidence, if material, is admissible.

4. Where portions of an answer in a deposition are improper, the same should be eliminated before the deposition is read to the jury; but where this is not done and the jury are plainly told that such evidence is excluded from them and not to be considered, the reading of the same does not constitute reversible error.

5. Under the issues in the case presented it was proper for the plaintiff to introduce evidence to show the condition of defendant's track for a reasonable distance from the place where the accident occurred.

6. A clause in an instruction setting forth that "gross negligence is defined by the law to be wilful or intentional negligence," is erroneous.

7. An instruction in behalf of defendant, ignoring one of the disputed facts upon which plaintiff based his claim, may be modified by the trial court.

8. The trial court necessarily possesses some discretion as to the number and character of the special interrogatories to be submitted to the jury, and in the case presented that discretion was not abused.

[Opinion filed February 14, 1890.]

IN ERROR to the Circuit Court of Montgomery County ; the Hon. J. J. PHILLIPS, Judge, presiding.

Messrs. MORRISON & WHITLOCK, for plaintiff in error.

Messrs. BROWN, WHEELER & BROWN, for defendant in error.

CONGER, J. This was an action on the case. The declaration in the first count alleged in substance, that on the 11th day of March, 1887, defendant in error was a passenger from Virden to Litchfield, on the railway of plaintiff in error, and was using an ordinary complimentary pass, upon the back of which was printed: "This pass is not transferable, and the person accepting it assumes all risk of accident and damage to person and baggage." That the company permitted its track to be out of repair, by being rough and uneven, the ties being rotten, the road bed too narrow to support the track; the rails to become worn and battered and split; and by the use of short rails of eight feet, and the insecure fastenings of the rails, and by cars too light to be used on the track at a high rate of speed; and that by the use of defective machinery and the running of the cars at a high and dangerous rate of speed, the cars were derailed, and defendant in error was injured; the second count charges substantially the same, except that it did not set out the pass. A plea of not guilty was filed and cause tried by jury resulting in a verdict of \$6,500 in favor of defendant in error.

We think the evidence fully warranted the jury in finding that the servants of plaintiff in error were guilty of gross

negligence, and it was upon the theory that gross negligence alone would warrant a recovery that the case was tried, and instruction given. Ill. C. R. R. Co. v. Read, 37 Ill. 484.

Various errors are assigned which we will notice in the order named in the brief of plaintiff in error. In the examination of the jury by counsel for defendant in error, the court, over objection, permitted the following question to be asked: "Would the fact, if it should be shown in evidence that the plaintiff was riding on a free pass at the time of the injury, influence your judgment or verdict in the case?" No challenge was made to any juror because of the answer to this question, hence it may be assumed such questions were asked for the sole purpose of affording information to counsel, upon which to intelligently exercise a peremptory challenge, and for such purpose we see no serious impropriety in the question.

It is said the use of the pass was a fact stated in the declaration, and counsel say: "Can it be said that a juror under such circumstances is not to be influenced by the fact? To so hold is in effect to hold that the juror must disregard the admission of the record, because the facts alleged on the face of the declaration show that the plaintiff had, for a good consideration, contracted to release the defendant from liability except upon certain conditions."

It was also a fact stated in the declaration that the defendant was a railway corporation, and it would have been proper to have asked a juror if such fact would influence his judgment or verdict. It is true, either of these questions, if confined to the literal meaning of the words, would give no light as to the juror's feelings or prejudices, but such questions are commonly understood to mean, would such facts in the mind of a juror have an undue importance and hence improperly influence his judgment in reaching a verdict. While the question is not accurate, and is subject to criticism, we can not think it worked any injury to plaintiff in error.

Second. Objection is made to certain questions asked Dr. Ranch, which were as follows:

Q. "Is it or not, ever true, that injury to the spine from

concussion, or perhaps otherwise, of which the patient may for the time be ignorant himself, may afterward develop into serious injury?"

A. "It is."

Q. "Is it or not a fact, that the injury to this spine from such cause, apparently unknown to the patient at the time, may develop sooner or later, weeks or months, perhaps, after the injury has been received?"

A. "Yea. In this connection I would simply make this remark, that when I speak of this injury to the spinal column, I also include the spinal marrow that is inside."

Dr. Rauch had, as a physician, attended upon defendant in error perhaps three weeks after the injury occurred, and from that time on for a considerable period, and had already detailed to the jury the symptoms he found, and the opinion he had formed in reference to the character and degree of the injury received by the defendant in error, hence we see no objection to these questions, except possibly that they were leading in form; but that objection not having been made upon the trial, it is too late to raise it for the first time in this court.

Third. It is insisted the court admitted improper evidence, as stated by counsel for plaintiff in error upon this point. "The objections are, first, the testimony should have been confined to the condition of the road at the time of the accident, or at least to a period not later; and second, the evidence should have been confined to that part of the road where the accident did in fact occur." The condition of the track prior to or after the injury, is not material or important except in so far as it may tend to show its condition at that time, which is the real question for the jury to determine. One Howard, a witness, had stated to the jury that he had passed over the track a few days before the accident, and described its condition, and then stated that he again saw the track in July, following March (the time of the accident), and was then asked its condition as compared with its condition at the time of the accident or shortly before, and answered that he could not see any alteration. Where evidence tends to show the track to be in the same condition shortly before and after the acci-

dent occurred, it raises a presumption that it was in the same condition at the time of the accident, and hence bears upon one of the material questions to be determined by the jury.

Objection is also made to the depositions of Schlön and McKean, because, with evidence that was proper and legitimate in reference to the condition of the track, they also spoke of what occurred when repairing the track, in August and September following the accident. The court, in passing on this objection, said:

“While I can not separate the answer to a question, where the question is proper, very well—that which is improper and that which is proper—without breaking the connection of the question, so that it may be misleading or misunderstood by the jury, I can only say that the question of repair can not affect the issue that is trying in any manner whatever, because the reason for the repair may grow out of so many different causes, occurring at different times, and with a different purpose in view; that nothing can be assumed by the jury in consequence of that, and any evidence of that character is excluded from them and not to be considered by them in making up their verdict.” The depositions were then read to the jury. Where there are portions of an answer in depositions that are improper, and the jury are plainly told, as they were by the trial court in this case, that such evidence is excluded from them and not to be considered, we do not think it so serious an error as to justify a reversal, when it is apparent no harm has resulted, although the better practice would be to eliminate the objectionable features from the deposition before it is read to the jury.

The second branch of this objection is, that the evidence should have been confined to the place where the accident occurred, which place is defined by counsel for plaintiff in error in their brief, as “the part of the road where any evidences could be seen immediately after the accident, of any giving way of the track in any of its parts, or evidences of the train having left the rail.” This would doubtless be the rule where the sole cause of the accident is a defect in the track, which can be located, such as a defective culvert, bridge

or broken rail. But in the case at bar it is agreed by both parties that the immediate cause of the derailment of the train was the breaking of one of the car wheels, and the cause of such wheel breaking was the point in contention.

The plaintiff in error maintained that the wheel broke from some latent defect, under reasonable usage and strain, and after it had been properly tested; while defendant in error insisted the broken wheel was caused by the train running too rapidly over a rough and uneven track, thereby causing the cars to oscillate from side to side, throwing the flange of the car wheel against the rails with such force, as, by a constant repetition of such blows, to break it. It was therefore proper for defendant in error, in seeking to sustain his theory, to show to the jury the condition of the track in this respect, for such a distance from the place of the accident as would throw light upon this question.

Such inquiry, however, should be limited by the distance over which the dangerous rate of speed was maintained, immediately preceding the accident, and which fairly might be regarded as one continuous act of negligence, and the immediate cause of the breaking of the wheel. We think the inquiry was governed by these principles, and hence there was no error in this respect.

Fourth. Error is assigned upon the instructions given and refused. The first and fourteenth instructions presented by plaintiff in error attempted to define gross negligence, in the following words: "That gross negligence is defined by the law to be wilful or intentional negligence." The court struck this language out of the first instruction and refused the fourteenth. To sustain this language in the instructions the case of *T. W. & W. R. R. Co. v. Beggs*, 85 Ill. 84, is relied on, but we fail to see its bearing on the case at bar. In that case the court in the opinion clearly give the reason for using the language in reference to what would, under the circumstances of that case, make the company liable. The court say: "He (Beggs) was traveling on a free pass issued to one James Short, and not transferable, and passed himself as the person named in the pass. By his fraud he was riding on the car. Under

such circumstances the company could only be held liable for gross negligence, which would amount to wilful injury." If we understand this language properly it does not assert, as contended by counsel for plaintiff in error, that gross negligence can not exist without wilful injury, but that there is a degree of gross negligence which can only arise from wilful or intentional injury. But whatever may be the true meaning of the language it has no application to the present case, as it is not pretended that defendant in error was guilty of any fraud in the use of his pass, and for the further reason that we have, in C., B. & Q. R. R. Co. v. Johnson, Adm'r, 103 Ill. 521, a definition of the term "gross negligence," with which the objectionable language in the instructions in the present case was wholly inconsistent. The court in that case say: "Gross negligence is the want of slight diligence." "When there is a particular intention to injure, or a degree of wilful or wanton recklessness, which authorizes the presumption of an intention to injure generally, the act ceases to be merely negligent and becomes one of violence or fraud." "In negligence there is no purpose to do a wrongful act or to omit the performance of a duty." "Negligence, even when gross, is but an omission of duty; it is not designed and intentional mischief, although it may be cogent evidence of such fact." "What is less than slight negligence the law takes no cognizance of as a ground of action, and beyond gross negligence the law, while recognizing there may be liability for trespass because of a particular intention to do wrong, or of a degree of wilful and wanton recklessness which authorizes the presumption of general intention to do wrong, recognizes no degree of negligence."

Instruction No. 3 was properly modified because, as presented, it entirely ignored one of the disputed facts upon which defendant in error based his right of recovery, *i. e.*, the dangerous speed of the train. As a series we think the instructions fairly presented to the jury the law of the case, and that no error of sufficient importance exists in them to authorize a reversal.

The fifth objection is that the court refused to submit to

the jury certain questions for special findings, and modified others which were given. It would be useless to state them all. There must of necessity be a discretion in the court as to the number and character of special findings to be submitted to the jury, and unless it is apparent that such discretion has been abused, to the prejudice of the party complaining, the action of the court should be upheld. After a careful examination we are satisfied that justice has been done in this respect. Those which the court refused to submit to the jury were either calling for answers upon mere evidentiary facts, or were irrelevant and were objectionable under the rule announced in *C. & N. W. R. R. Co. v. Dunleavy*, 129 Ill. 132.

Upon a careful consideration of the whole record we are satisfied that plaintiff in error had a fair trial, and that justice has been done.

The judgment of the Circuit Court will therefore be affirmed.

Judgment affirmed.

P. E. LEWIS ET AL.

V.

NANCY R. FLOWREE, ADMINISTRATRIX, ETC.

Practice—Appeals from County Court.

An appeal to the Circuit Court from an order entered by the County Court, on petition of an administratrix to sell real estate, may be granted at any time during the term. The time for appeal is not limited to twenty days.

[Opinion filed February 14, 1890.]

IN ERROR to the Circuit Court of Mason County; the Hon. L. LACEY, Judge, presiding.

MESSRS. I. R. BROWN and B. S. PRETTYMAN, for plaintiffs in error.

Messrs. WALLACE & LACEY, for defendant in error.

WALL, J. This was a proceeding originating in the County Court of Mason County, upon a petition by an administratrix, for leave to sell real estate to pay debts. An order of sale having been entered according to the petition, an appeal to the Circuit Court was prayed for by the present plaintiffs in error, which was granted "upon filing good and sufficient appeal bond in the sum of one hundred dollars." This, as well as the order of sale, was entered on the 8th of October, 1888.

Afterward, on the 30th of October, 1888, being one of the days of the same term of court, the following was entered: "And now on this day come the defendants herein, viz.: Eliza Lewis, alias Elizabeth Lewis, Samuel Flowree, Edward Lewis, Lillie Lewis and Mary Webb, by I. R. Brown, their attorney, and file appeal bond herein, in the penal sum of one hundred dollars, signed by E. E. Lewis, P. E. Lewis, W. H. Flowree, S. C. Flowree and Lewis Davenport, as security. And the court deeming the said bond good and sufficient, the same is approved and appeal granted in accordance with the prayer of said defendants."

In the Circuit Court the administratrix moved to dismiss the appeal because the bond was not filed within twenty days of the decree of sale. This motion was sustained and the appeal dismissed. Error is now assigned upon this ruling of the Circuit Court. The defendant in error argues that the matter is controlled by the provisions of Sec. 124, Ch. 3, R. S. It was held in *Darwin v. Jones*, 82 Ill. 107, that the appeal must be perfected by filing bond within twenty days after the entry of the order or decree appealed from, and if this appeal depended upon that section it was not properly perfected. It is urged, however, on behalf of plaintiffs in error, that the appeal may be sustained under Sec. 122, Chap. 37, R. S., *Starr & C. Ill. Stat. 729*, which provides that "appeals may be taken from the final orders, judgments and decrees of the County Courts to the Circuit Courts of their respective counties in all matters, upon the appellants giving bond and security in such amount and upon such conditions as the court shall approve, except as otherwise provided by law."

There is no necessary repugnance between Sec. 124, Chap. 3, and the section last quoted. Both may stand and either may be invoked in taking an appeal from the County to the Circuit Court. *Bruce v. Schuyler*, 4 Gilm. 221; *Fowler v. Pirkins*, 77 Ill. 271; *Steele v. Steele*, 89 Ill. 51.

Then the question is as to the true construction of the last named section—122, Chap. 37. Suppose reliance is had solely upon the order of October 30th; can the appeal be sustained? The order of October 8th is silent as to the time when the bond was to be filed, and as to the sureties thereon, and it may be doubted whether that order alone would have been sufficient to support an appeal. Who was to determine whether the bond was filed in due time, if the time was not fixed by statute—or whether the sureties were good for the amount?

Disregarding the order of October 8th or considering it as interlocutory merely—the order of October 30th contains all that is requisite to authorize an appeal. It recites that a bond in a certain amount and with certain sureties had been filed, and that the court, deeming the bond sufficient, approved the same and granted an appeal as prayed. This order is complete in and of itself—and the only question seems to be whether it was competent to make it, or any order granting an appeal, at any time during the term, though more than twenty days after entering the decree of sale. We entertain no doubt it is competent to do so under Sec. 122, Ch. 37, and whatever meaning may be attached to the words “except as otherwise provided by law,” they were not intended to limit the power of the court to grant an appeal at any time during the term at which the order sought to be appealed from was entered.

Whether these words qualify the general right of appeal or merely the power of the court in reference to the amount and conditions of the bond so as not to interfere with what may be “otherwise provided by law,” we need not inquire. There is here given express authority to the County Court to approve the amount and conditions of the bond, and impliedly to grant an appeal upon such terms as it may thus impose, and this is a power which, by all analogies, may be exercised at any time during the term, but not thereafter, at

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which the order appealed from was made. It is not limited by the words "as in other cases," contained in Sec. 124, Chap. 3.

If we are correct in this view, it was error to dismiss the appeal. The judgment is reversed and the cause remanded.

Reversed and remanded.

CATHERINE CONDON, GUARDIAN, ETC.,

v.

JULIA CHURCHMAN, ADMINISTRATRIX, ETC.

Guardian and Ward—Settlement—Report—Citation—Chancery Proceedings—Exceptions—Interpleader.

1. Upon the citation of a guardian to make a report at the instance of the administratrix of the ward, this court holds that a settlement between the guardian and ward at about the time the latter became of age, she being in poor health, uneducated, of weak mind and under the influence of her guardian, can not stand.

2. On appeal to the Circuit Court from an order of a county judge, entered on the hearing upon a citation to a guardian, the case does not become a chancery proceeding merely because it is referred to a master to take testimony, and the judgment is called a decree and is in form appropriate to chancery proceedings.

3. In the case presented, there being no bill of exceptions, or exception taken to the final judgment or rulings of the trial court, the judgment for plaintiff can not be disturbed.

[Opinion filed February 14, 1890.]

IN ERROR to the Circuit Court of Calhoun County; the Hon. G. W. HERDMAN, Judge, presiding.

Mr. J. S. CARR, for plaintiff in error.

Mr. T. J. SELBY, for defendant in error.

WALL, J. The plaintiff in error, who was guardian of Mary Elizabeth Kliffens, was cited to make a report at the instance of the administratrix of the ward. She presented a report to

the County Court in response to the citation, which was not approved, but the court stated the account and found there was due from the guardian the sum of \$10.45, from which finding and judgment the administratrix prosecuted an appeal to the Circuit Court. In the Circuit Court the cause was referred to the master in chancery to take the testimony.

As appears from the record the master reported certain testimony as taken by him, and the court, upon final hearing, charged the guardian with the sum of \$750 in addition to the balance reported by the guardian, with six per cent per annum from November 20, 1880, with annual rests, for money realized by the guardian from the sale of the ward's real estate, and it was ordered that the guardian pay to the administratrix of the ward the sum of \$1,154, that being the amount found to be due in that behalf, within sixty days, and that the guardian pay the cost of the proceeding. Regarding the proof contained in the report of the master, it is somewhat uncertain whether the ward had attained the age of eighteen years when the real estate was sold, but her exact age is not a controlling circumstance in view of the other facts appearing from the report.

It appears that on the 20th of November, 1880, the ward then being probably about, if not a little over, the age of eighteen years, conveyed the land to the guardian, and that the latter on the same day conveyed to one Romain, who paid her therefor the sum of \$750. It appears also that this was in pursuance of an arrangement agreed upon, before; Romain having desired for some time to acquire the land but the ward being unwilling to sell to him direct, or at least refusing to do so.

It is not denied that the guardian kept the money so received, but it is claimed that at or near the time of these conveyances the guardian and ward settled all matters between them, and that the guardian was to take the land in payment of all demands then held against the ward, and in further consideration was to keep and take care of the ward, who was then in failing health, the remainder of her life and give her remains after death a decent burial. It appears that the

ward was then in very poor health; that she was uneducated, not of strong mind according to any of the proof, and quite the contrary according to some of it; that she was very decidedly under the influence and control of the guardian, who was her grandmother, with whom she then resided, as she had always during the guardianship, a period of about eleven years, and that the guardianship accounts were then unsettled. Under such circumstances the alleged settlement can not be permitted to stand. *Carter v. Tice*, 120 Ill. 277; *Gillett v. Wiley*, 126 Ill. 310; 1 Story Eq. Jur., Sec. 217; 2 Pomeroy's Eq. Jur., Sec. 961.

Aside from this consideration of the merits the judgment must be affirmed, because there is no bill of exceptions containing the evidence in the case, nor does it appear that any exception was taken to the final judgment or any of the rulings of the court. This was not a chancery proceeding. If it were this objection could not be made. *Smith v. Newland*, 40 Ill. 100; *C. A. W. Co. v. C. M. L. I. Co.*, 57 Ill. 424.

It is true the testimony was taken by the master in chancery under an order of reference to him for that purpose, and that the final judgment was called a decree and is much in the form appropriate to chancery proceedings. This does not render it a chancery cause. It was, as already stated, a mere citation in the County Court upon the petition of the administratrix, and there was no occasion nor was there any order to transform it.

It was necessary to except to the rulings and final judgment and to preserve the evidence by bill of exceptions, in order to review the proceedings in a court of appellate jurisdiction.

The judgment will be affirmed.

Judgment affirmed.

THE PRESIDENT AND TRUSTEES OF THE TOWN OF
RUSHVILLE
V.
TOWN OF RUSHVILLE ET AL.

Taxation—Statutes—General and Special—Construction of—Repeal by Implication.

1. A statute will never be held to be repealed by implication if such presumption can be avoided on any reasonable hypothesis.
2. In the case presented, it is held that Sec. 4, Art. 7, of the charter of the town in question, in regard to the disposition of road and bridge taxes, was not repealed by the subsequent general law of 1883.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Schnyler County; the Hon. J. C. BAGBY, Judge, presiding.

MR. PHILLIP E. MANN, for plaintiff in error.

A general statute, without negative words, will not repeal the particular provisions of a former one unless the two acts are irreconcilably inconsistent. *Covington v. City of East St. Louis*, 78 Ill. 548; *Bruce v. Schnyler*, 4 Gil. 221; *Town of Ottawa v. La Salle County*, 12 Ill. 339.

"The repeal of a statute by implication is never permitted if it can be avoided on any reasonable hypothesis." *Bruce v. Schnyler*, 4 Gil. 221; *Board of Supervisors v. Campbell*, 49 Ill. 490; *Hume v. Gossett*, 43 Ill. 297; *City of Chicago v. Quimby*, 38 Ill. 274; *People v. Barr*, 44 Ill. 198; *People ex rel. v. Board of Supervisors of La Salle County*, 111 Ill. 527; *Butz et al. v. Kerr*, 123 Ill. 659.

Where statutes are seemingly repugnant it is the duty of the court so to construe them that the latter shall not repeal the former by implication. Cases cited, and *Gunnarssohn v. City of Sterling*, 92 Ill. 569.

The statute as to powers of road commissioners is general,

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and that as to powers of cities is special, and the special laws relating to cities are not to be affected by the general statute as to town officers. *The People v. Supervisors*, 111 Ill. 527.

Messrs. W. L. VANDEVENTER and S. B. MONTGOMERY, for appellee.

We maintain that the act of 1883 revised the whole subject of the division of taxes levied in such incorporated towns as appellant; for it applied by its express terms to all such towns, etc., as have control of the streets and alleys, and in such case such revision repeals all former laws on the subject. *Devine v. Cook County*, 84 Ill. 590; *Culver v. Third National Bank*, 64 Ill. 528; *Andrews v. The People*, 75 Ill. 605; Ill. & Mich. Canal v. Chicago, 14 Ill. 334.

CONGER, J. John S. Stutsman, during the year 1888, was treasurer and ex-officio collector of delinquent taxes of Schuyler county, and he filed this bill of interpleader, requiring the president and trustees of the town of Rushville, and the town of Rushville (the former being an incorporated village and the latter the township), to interplead as to the sum of \$43.70—being one-half of the amount of the highway tax levied by the commissioners of highways of the town of Rushville on property within the corporate limits of Rushville (the village) for road and bridge purposes.

The corporation relies upon Sec. 4, Art. 7 of its charter (*Private Laws of 1869*, Vol. 4, page 38), which is as follows: "From and after the passage of this act, the collectors of the several townships in which said town of Rushville is located and included, shall, in the collection of all bridge or road tax levied and collected for township purposes, by township authorities, keep an account of the amount of all such taxes by them collected, on property within the corporate limits of said town of Rushville; and upon the collection thereof shall pay to the town treasurer of the town of Rushville such amount as shall have been collected upon property within the limits of said town; and the same shall be exclusively expended by said town in improving the streets and

highways, and in building and repairing the bridges within the corporate limits of the town; and said town is hereby made a road district, under the management and control of the said corporation." The town of Rushville, on the other hand, insists that the foregoing provision of the charter has been repealed and rendered nugatory by Sec. 16 of the act entitled "Roads, Highways and Bridges." See Session Laws of 1883, p. 136.

The last half of said Sec. 16, the only part that is germane, provides: "Provided that one-half the tax provided to be levied in Sec. 13 of 'this act' (tax levied on the property of the town for road and bridge purposes, Sec. 13 of said act), and collected for road and bridge purposes, on the property lying within an incorporated village, town or city in which the streets and alleys are under the care of the corporation, shall be paid over to the treasurer of such village, town or city, to be appropriated to the improvement of the roads, streets and bridges, either within or without said village, town or city, and within the township, under the direction of the corporate authorities of such village, town or city." The Circuit Court held that the general law of 1883 repealed the foregoing provision of the chapter, and that the corporation was entitled to but one-half of the highway taxes raised within its limits, and the correctness of such holding is the only question presented by the record.

The rules in reference to a repeal by implication are: "A statute will never be held to be repealed by implication if it can be avoided on any reasonable hypothesis. A statute will not be repealed by implication unless the subsequent act is so inconsistent and repugnant to its provisions that the two can not stand together. A subsequent general law will not, by implication, operate as a repeal of a special law on the same subject, though inconsistent with it. And a repealing clause of a general statute will not repeal a special one on the same subject, unless a clear intention is manifested that such repealing clause shall embrace special as well as general laws." *Bruce v. Schnyler*, 4 Gilm. 221; *Board of Supervisors v. Campbell*, 42 Ill. 490; *Town of Ottawa v. La Salle Co.*, 12 Ill. 339; *Butz v. Kerr*, 123 Ill. 659.

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We see no difficulty in holding that the provision of the charter of Rushville may be sustained and enforced, notwithstanding the subsequent general law. It is not unreasonable, we think, to say that the legislature intended, by the law of 1888, to provide a rule applicable to all corporations not having any special provision in their charters upon the subject, but did not intend to interfere with provisions inconsistent with such general rule when found in special charters. The case of Butz v. Kerr, *supra*, is, we think, very much in principle like the one at bar.

The decree of the Circuit Court will be reversed, and the cause remanded, with directions to that court to enter a decree for the amount of money in controversy in favor of appellants, the president and trustees of the town of Rushville.

Reversed and remanded, with directions.

WILLIAM A. GROTE

v.

MICHAEL J. CLERIHAN.

Negotiable Instrument—Note—Real Property—Contract of Sale—Assignment of—Failure of Title—Instructions.

Upon an assignment of a contract for the purchase of real estate, executed by the vendee, which provided that the agreement was thereby sold by the plaintiff to the defendant, the latter to assume all the conditions contained in the original contract, the assignment also containing the terms of payment by the assignee to the assignor, this court holds that the assignor did not thereby guarantee that the vendor in the original contract would faithfully perform.

[Opinion filed February 14, 1890.]

IN ERROR to the Circuit Court of Morgan County; the Hon. C. EPLER, Judge, presiding.

Mr. M. T. LAYMAN, for plaintiff in error.

MR. GEORGE W. SMITH, for defendant in error.

WALL, J. The plaintiff in error brought assumpsit against the defendant in error upon a promissory note for \$100, bearing date November 3, 1888, due March 1, 1889. The case was tried by the court, a jury being waived, and it was stipulated that all legal defenses might be proved under the general issue. The finding was in favor of defendant against plaintiff for \$100. Judgment went accordingly.

The note sued on was given by defendant to the plaintiff in part consideration for the assignment of a written contract for the sale of a tract of land by and between Wemple Brothers and the plaintiff. Said contract bore date August 25, 1888, and witnesseth that Wemple Brothers sold the land described for \$2,250—\$200 in cash, or cash and approved note, due March 1, 1889; \$500 more was to be paid March 1, 1889, upon which plaintiff was to receive possession; but before taking possession he should execute his obligation for the balance of purchase money, making it a lien upon the land, which balance was to bear interest at seven per cent after the last named date. The assignment was written on the back of the contract, signed by both plaintiff and defendant, and provided that the agreement within for the sale of land was thereby sold by the plaintiff to the defendant, the latter "to assume all the conditions contained in the written agreement, and the said Clerihan (defendant), was to pay to the party of the first part (plaintiff), \$100, and to give his note or cash for \$100 on Saturday, November 3, 1888."

The cash payment of \$100 was made and the note sued on was executed. The defense was that there was a failure of title and that defendant was not only not bound to pay the note but that it was the duty of the plaintiff to refund the cash payment of \$100. The court took that view of the matter and gave judgment as already stated.

It appeared that the land was subject to some incumbrances in the shape of judgment liens, but that these, excepting a small part of the cost, had been discharged before the present suit was brought. It appeared also that there was a disagree-

ment between Wemple Brothers and the defendant as to the terms upon which a deed should be made and as to protecting defendant against the possible effect of any of said liens.

It will be noticed the agreement does not specify in so many words what sort of title should be conveyed, or indeed, that any conveyance should be made, nor when the final payment should be absolutely due. The want of certainty in these important respects might produce controversy between men of perfect integrity and the utmost prudence, but whatever might be the result of such an issue, we think there is nothing in this record to bar the plaintiff in his suit upon the note.

He merely sold his interest in the contract to the defendant. He did not undertake that Wemple Brothers should faithfully perform it, nor that, if they did, the defendant should receive or enjoy any certain measure of benefit there-

from.
Whatever rights were secured by the contract passed from the plaintiff to the defendant. It was open to the defendant to construe it and determine for himself what was its legal effect, and in the absence of fraud it is wholly unimportant whether it was worth more or less than either of the parties may have supposed. The plaintiff authorized the defendant to demand from Wemple Brothers all that he could have demanded, nothing more or less, but bound himself to nothing in that respect. The defendant assumed all conditions of the agreement and must look to Wemple Brothers for whatever title was called for in and by the contract.

The plaintiff asked the court to hold the following propositions of law, but the court refused to do so:

1st. "That the defendant was not entitled to a conveyance in fee simple, but only to such title as Wemple Brothers had at the time of their contract with plaintiff.

2d. That the writing on the back of the contract between plaintiff and Wemple Brothers, signed by plaintiff and defendant, is an assignment of the contract, and that defendant is required to look to Wemple Brothers for a conveyance of the premises."

It is not necessary to determine as to the propriety of the first. The second, however, is applicable and correct. It should have been held. We are of opinion the plaintiff was entitled to recover and that the judgment for defendant was erroneous. The same will therefore be reversed and the cause remanded.

Reversed and remanded.

MICHAEL BURKE
v.
CHARLES C. DALEY.

Pleading—Negligence—Failure to Keep Fence in Repair—Injury to Horse—Bull.

In an action to recover damages for an injury inflicted on plaintiff's horse by the bull of defendant, it is *held*: That the averment that by reason of the negligence and default of the defendant in failing to keep his part of a line fence in repair, the horse passed into defendant's pasture and was gored, was a sufficient averment that the results charged were caused by his negligence.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Jersey County; the Hon. G. W. HERDMAN, Judge, presiding.

Mr. THOMAS F. FERNS, for appellant.

Messrs. WILLIAM BROWN and W. S. HAY, for appellee.

CONGER, J. In this case a declaration was filed by appellant in substance alleging that appellant and appellee owned adjoining farms, and it was the duty of each to maintain one-half of the partition fence between the farms; that appellee

Burke v. Daley.

negligently permitted his half of the partition fence to so get out of repair that in consequence thereof appellant's horse escaped out of the pasture where he was feeding upon appellant's farm, into an adjoining pasture on appellee's farm, and was there gored and killed by appellee's bull which was running at large in appellee's pasture. A general demurrer was sustained to this declaration, and appellant, standing by his declaration, has brought the record to this court.

Counsel for appellee insist that the demurrer was properly sustained because there is no averment in the declaration that appellee had knowledge of the vicious propensity of his bull, and that before the owner of domestic animals such as horses, cattle, dogs, etc., can be made liable for injuries done by them it must be proven that he had notice of the inclination of the particular animal complained of, to commit such injuries, in all cases where the animals are rightfully in the place where they do the mischief. This may be a correct statement of the rule, but we do not think it meets the case at bar. The injury to appellant's property is in the declaration charged to have occurred primarily from the neglect of appellee to maintain his portion of the partition fence. The straying of appellant's horse into appellee's pasture and his being gored by the bull, are charged to be the results of such neglect. The rule in such cases is stated in 1 Chitty's Pl. 82, and is quoted and approved in *Mareau v. Vanatta*, 88 Ill. 132. It is as follows: "The owner of domestic or other animals not naturally inclined to commit mischief, as dogs, horses and oxen, is not liable for any injury committed by them to the person or personal property of another, unless it can be shown that he previously had notice of the animals' mischievous propensity, or that the injury was attributable to some other neglect on his part." See also *Saxton v. Bacon*, 31 Vt. 540. Whether appellee could have reasonably anticipated the result which flowed from his neglect to maintain the partition fence, or, in other words, whether the damages to appellant are the natural and proximate consequence of appellant's negligent act, is, we think, a question of fact for the jury. The court can not pronounce either way as a matter of law.

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The declaration alleges in direct terms that by reason of the negligence and default of appellee, the horse passed into appellee's pasture and was gored. This, we think, is a sufficient averment that the results charged were caused by appellee's negligence, and the jury can determine from the evidence whether it is sustained or not.

The judgment of the Circuit Court will be reversed, and the cause remanded.

Reversed and remanded.

HENRY C. MEYER

V.

HUSE, GOODELL & Co.

Judgments—Reversal—Nominal Damages—Written Contract—Construction of—Instructions.

This court will not reverse a judgment merely for the purpose of permitting the recovery of nominal damages.

[Opinion filed February 14, 1890.]

IN ERROR to the Circuit Court of Cass County; the Hon. L. LACEY, Judge, presiding.

Messrs. HEWITT & THACKER, and MORRISON & WHITLOCK for plaintiff in error.

Messrs. MILLS & MCCLURE, for defendants in error.

WALL, J. This was an action of covenant. The alleged breach was the failure to build and maintain a dam of earth, six feet high, in the lowest depression of the ground on which it was to be constructed. The case was tried by jury, resulting in a verdict and judgment thereon for defendants. The evidence was conflicting in reference to the height of the dam

in the lowest place, but there was enough on behalf of defendants to warrant a finding for them in this respect. The real controversy is whether, conceding it was six feet high, it was constructed according to contract, of earth.

It appears that a flood-gate or board, one foot high, was put in at the place in dispute, and that, according to defendants' evidence, the dam was five and one-half feet high to the bottom of this flood-gate, as it was originally constructed, and that subsequently earth was thrown in front of the flood-gate until practically on a level with the top of the same. The evidence also tended to show that the flood-gate was water tight before the earth was filled in against it; that the purpose of it was to let off the surplus water, and thus protect the dam while it was green, and that it had not been lifted for three or four years before suit was brought. And there was evidence tending to prove that the plaintiff had suffered no damage by reason of the manner of the construction of the dam.

It is urged the court erred in refusing to instruct the jury that if the dam was not constructed according to contract the plaintiff was entitled to a recovery. The court did so instruct in general terms, but refused to advise the jury that if the earthwork was only five and one-half feet high, and the flood-gate placed above it, the contract was not complied with.

There are some technical objections to the form and terms of the instructions asked by the plaintiff on this point, which perhaps would justify their refusal, but the court evidently took the view that if there was no damage caused by the use of the wooden flood-gate in the first instance, and if it was then made water-tight and afterward filled in with earth so that the object and purpose of a dam six feet high was accomplished, then the plaintiff could not recover, and so instructed at the instance of the defendants. The court was careful, however, to insert, as a condition of such non-liability, that no damage had been done by reason of such construction. The position of plaintiff is, that as the contract called for a dam of earth, nothing else—though as good for all purposes—will answer, and that for such failure nominal damages, at least, will be recoverable.

It is not probable the jury were misled by these instructions to find for defendants if there was any real or substantial damages caused by their non-compliance with the contract, but they perhaps did understand that if there was no such damage, even though the letter of the undertaking was not fulfilled, there should be no recovery; and thus the idea of nominal damages merely was not presented, if not wholly excluded. To this extent only, if at all in this respect, were the instructions erroneous.

But it is well settled that a judgment will not be reversed merely to permit nominal damages to be recovered, and when this evidence is all considered and it is remembered that the case had been tried twice—the first jury not being able to agree, and the second finding for the defendants—we are not impressed with the belief that the ends of justice require us to reverse the case for this error, if error it is.

Counsel urge, however, that the instructions given for defendants were faulty, because one of them contained this expression: "And if the jury further believe that earth was thrown against the wooden portion of said dam in such a quantity as to make the same substantially a dam of earth," etc., and another the following: "And that the dam as constructed was sufficient to hold water and prevent the same from passing through, and was of the requisite height." It is argued that the court thereby left the construction of the contract to the jury. We think the objection untenable.

By these expressions, in connection with the context, the court construed the contract, and left the jury to find as a fact whether the dam, as completed, was substantially of earth and of the height required, which, of course, was six feet. The judgment will be affirmed.

Judgment affirmed.

C. AULTMAN & Co.

v.

JAMES A. HENDERSON.

Sales—Engine—Contract for Shipment and Delivery of—Refusal to Accept—Omission of Condition—Fraud—Practice Act, Sec. 34—Warranty—Breach—Evidence—Damages.

1. An order calling for the shipment of an engine is complied with by an offer to deliver one in the town where the same was written.

2. Evidence can not be admitted to prove that a provision was fraudulently omitted from an order, in the absence of verification by affidavit in conformity with Sec. 34 of the Practice Act.

3. Where a contract of sale contains provisions fixing the rights of the parties thereto, in case, after trial, the machine in question fails to comply with the warranty contained therein, the purchaser can not decline to receive the same upon the ground that the year before, in other hands, it failed to work properly.

4. A machine that has been repaired will be presumed to be in working order and it is the duty of a person ordering such a machine to give it a fair trial.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Montgomery County;
the Hon. J. J. PHILLIPS, Judge, presiding.

Messrs. LANE & COOPER, for appellants.

Messrs. T. M. JETT and A. N. KINGSBURY, for appellee.

WALL, J. This was an action of assumpsit by the appellant against the appellee.

The declaration contained a special count on a written instrument signed by the defendant, bearing date July 5, 1888, whereby he requested the plaintiff to ship to him, in care of the agent of plaintiff at Harvell, Illinois, on or before July 12, 1888, one No. 12 Monitor engine, with self guide, and the fixtures and extras usually furnished by plaintiff, in consideration whereof he agreed to receive said engine on arrival,

subject to the conditions of the warranty printed below, and to pay \$600 at the time and place of delivery, and to deliver an old engine of his as additional payment. The money payment was to be made by the execution of his two promissory notes, payable at certain specified times and bearing six per cent interest, which notes were to be secured by a mortgage on the property sold. It was averred that the plaintiff furnished the engine at the time and place named in the contract, and that defendant refused to accept and pay the money or execute the notes and deliver the old engine.

The pleas were, first, the general issue; second, a special plea averring a breach of warranty in this, that the engine was not well constructed and would not work properly. The case was tried by the court, a jury being waived, and the issues were found for the defendant, upon which judgment went against the plaintiff for cost. Error is now assigned upon the rulings of the court in reference to the admission of evidence and in so finding the questions of fact arising on the evidence.

The plaintiff proved the written order set out in the declaration and that an engine such as described in the order was at the place named on and before the day specified. It appeared that this engine was there when the contract was made and the order signed, and that as a matter of fact the contract was with reference to this particular engine. It is insisted by appellee that the plaintiff failed to prove a compliance with the order which called for the shipment by the plaintiff to the place named of the engine described, and that such a request would not be complied with by furnishing at the place named an engine which was already then in the plaintiff's possession.

The order does not specify where the engine is to be shipped from nor by what route it shall come, and manifestly these were matters of no importance to the defendant if he got, at the time and place named, the article he bargained for.

By the mere letter of the order it required the plaintiff *thereafter* to ship to the place named, by the route to be selected by the plaintiff, the engine therein described. This would imply that the agency of a carrier was to be called in

aid and that the engine was thereby to be transported some distance, long or short, to the place named—but it would hardly be reasonable to say that the plaintiff could not have performed this transaction by an agency of his own without resorting to the service of a carrier, nor that it was necessary that the article should have been brought from any particular place.

The spirit of the contract and the essential point in this respect was that at the time and place fixed, an article as described should be in readiness for the defendant. Counsel for appellant argue that there was an attempt here to modify and vary the terms of the writing by parol. The argument is somewhat plausible but unsound. It does appear that the parties contracted in reference to this very engine and while the order called for an engine to be shipped, it was intended all the while to refer to *this* engine; but this is unimportant. The real question is as already stated, whether the plaintiff substantially complied with the contract by furnishing an engine which had already been shipped, and was there when the order was made. This question must be answered affirmatively, and it is not necessary to consider the parol proof that the parties intended the contract to refer to the engine in controversy. By the proof stated the defendant was placed in default, and he was called upon to show some excuse for his non-compliance with the contract.

This he sought to do by showing, first, that the written order omitted a provision mutually agreed upon that the defendant should have the right to countermand the order by or before the 12th of July; that this omission was through the fraud of plaintiff's agent and unknown to defendant, and that the defendant did countermand the order within the time; and, second, that the engine would not work well. The defendant testified that he reserved the right to countermand the order, and that the order was so read to him by the agent of the plaintiff by whom it was written out, and that while defendant had a copy and could read, yet he did not read it before signing nor after, but supposing he had the right to countermand, he did so within the time limited.

There is no dispute that he countermanded, but the question is whether he had such right. He certainly had not under the terms of the order as written, nor would it be competent by oral proof to vary the writing so as to show that a positive and definite provision was really subject to a condition rendering it wholly optional with the defendant whether to make the purchase or not.

The offered proof tended to show that the instrument was wholly void and not binding upon the defendant, because a substantial feature of it was fraudulently omitted by the agent of the plaintiff. If so, and if defendant exercised proper diligence to know the contents of the paper before signing it and was deceived, he might well place his defense upon the ground that he did not execute the order as it now appears. But to do this it was necessary that he should verify his plea by affidavit, according to the provision of Sec. 34 of the Practice Act. In *Lockridge v. Nuckolls*, 25 Ill. 178, the Supreme Court say, that under this section "it has been uniformly held that the party is not permitted to deny the execution of the instrument, or put the other party to its proof, except in the mode prescribed. Until that provision is complied with, the mere production of the instrument proves itself without further evidence. And when admitted in evidence the maker has no right to deny or rebut by evidence the genuineness of its execution." The plaintiff objected to this evidence but was overruled. There being no plea verified by affidavit denying the execution of the instrument in writing sued on, this evidence was incompetent, and is not to be considered in support of the defense.

As to the second ground, the evidence tended to show that the engine would not work well when in the possession of one Caldwell, a former purchaser, by whom it was returned to the plaintiff. This was during the previous year, and there was some conflict in the proof as to the performance of the engine at that time. It appeared that since then it had been overhauled and put in good order, and the fair inference is, that whatever defects there may have been when in Caldwell's possession, it was reasonably fit for use when the defendant

bargained for it. On referring to the terms of the order it will be found that, in case the engine, after trial, failed to fill the warranty, the purchaser was required to notify the agent and an opportunity was to be afforded to remedy the defect, and if it could not be made to fill the warranty, that part which failed should be returned and another furnished, which should perform the work, or the money and notes should be returned and no further claim should be made on the vendor. In view of this provision of the contract, the defendant was not justified in refusing to take the engine because it had not worked well when in the hands of Caldwell the year before. It had since been put in repair and was apparently and presumably in condition for effective service, and under the plain terms of the contract it was the duty of the purchaser to take it and give it a fair trial.

If it failed the vendor would have the right to make it good and sufficient or to return the consideration. Had it been palpably worthless, so that any effort to work it was sure to fail, and useless expense and delay sure to follow, the case would be quite different, and in that event it may be the law would warrant the course taken by the defendant. Upon the facts as they appear in the record, we are of opinion the finding should have been for the plaintiff. It is urged, however, that at most, the plaintiff was entitled to merely nominal damages, and that the judgment ought not to be reversed to enable such recovery. This position rests upon the assumption that the damages would be the difference between the contract price and the market value of the article. This engine was not a new one and if it were it does not appear that it would have had a market price at the place of delivery.

It is not proved nor is it reasonable to infer that a second-hand article had a market value capable of ascertainment. It is probable that while it might have been substantially as useful as if new, yet it could not readily be sold because it was not new. It is therefore impossible to say that if the plaintiff was required to keep the engine his damages would be only nominal. We are not to be understood, however, to hold that plaintiff was, upon the facts stated, required to retain the

property and recover damages for the failure of defendant to receive and pay for it.

Where a vendee sues a vendor for the non-delivery of goods, the measure of damages is usually the difference between the contract price and the market value at the time the goods should have been delivered.

Where a vendor sues a vendee for goods which have been delivered he may of course recover the contract price, but where there has been no delivery the vendor may store the goods for the vendee, giving him notice that he has done so and recover the full contract price, or he may keep the goods and recover the excess of the contract price above the market price at the time and place of delivery, or he may upon notice to the vendee proceed to sell the goods in their then condition, for the best price obtainable, and recover the loss if the goods fail to bring the contract price. *Bagley v. Findlay*, 82 Ill. 524; *Parsons on Contracts*, Vol. 2, page 484, 3d Ed.; *Sedgwick on Measure of Damages*, 3d Ed., 296.

As the case must be tried again we need express no opinion as to the proper measure of damages in the event of recovery. The judgment will be reversed and the cause remanded.

Reversed and remanded.

WILLIAM SHARP ET AL.

v.

H. A. SMITH ET AL.

Master and Servant—Labor and Material—Recovery for—School Directors—Liability as Individuals.

In an action upon a contract containing the names of certain individuals, the language thereof indicating that they were at the time of its execution school directors of the district in question, but not that they were acting in such capacity, this court holds that they were individually liable thereon, and declines to interfere with the verdict for the plaintiffs.

[Opinion filed February 14, 1890.]

Sharp v. Smith.

APPEAL from the County Court of Moultrie County; the Hon. H. W. MINOR, Judge, presiding.

Mr. JOHN R. EDEN, for appellants.

The law seems to be well settled, that where the officers of a municipal corporation enter into a contract or engagement in connection with a subject fairly within the scope of their authority, it shall be intended to have been done officially, unless they made an express agreement to become personally liable, though they exceed their own authority. *Duncan v. Niles*, 32 Ill. 532; *Mann v. Richardson*, 66 Ill. 481; *Broadwell v. Chapin et al.*, 2 Ill. App. 511; *Burrows on Public Securities*, page 12.

Mr. F. M. HARBAUGH, for appellees.

CONGER, J. This was an action of assumpsit with special count upon the written contract which appears below, and common counts for work and labor, and the money counts, etc. Plea general issue, trial by the court and judgment for appellees for \$224.60.

Upon the trial appellees offered in evidence the following contract: "This contract made and entered into this 11th day of August, A. D. 1888, by and between Hugh A. Smith and Riley W. Creech, parties of the first part, and William Sharp, Joshua Coplin and Christopher Monroe, directors of district No. two (2) in township No. fourteen (14), range five (5) east of the 3d principal meridian, in the county of Moultrie and State of Illinois, parties of the second part, witnesseth that parties of the first part hereby agree to furnish all material, and in good, workmanlike manner build and fully complete a brick school house in said district, according to plans and specifications herewith made a part of this contract, subject to any alterations mutually agreed upon, before or during the erection of said building. In consideration of the above agreement, the parties of the second part agree to and with the parties of the first part, to pay them the sum of \$924.60 in the following manner: to pay for brick and lumber as the same is

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delivered upon the ground ; balance upon the completion and acceptance of the said building. Subscribed to by us this day and date above written.

" H. A. SMITH, }
 " R. W. CREECH, } Contractors.

" WM. SHARP, }
 " JOSHUA COPLIN, } Directors."
 " CHRIS. MONROE, }

It was agreed between the parties on the trial that prior to the making of said contract, the legal voters of said district No. 2 had at a legal election voted the sum of \$700 to build a school house in said district, and that appellees had built the house according to contract, and had been paid to the extent of \$700 by orders drawn by appellants as school directors of said district No. 2 on the township treasurer of said township; that soon after the completion of the school house Sharp and Coplin (Monroe having resigned) issued an order as directors on the treasurer for the balance remaining due upon the contract, and delivered the same to appellees, but that the payment of the same was enjoined by bill brought by some of the taxpayers of the district, so that such order never was paid. Appellants are sued as individuals and the court below held them liable as such, and the correctness of that judgment depends upon the question whether the contract binds them individually or only the district of which they were directors.

We are inclined to think that appellants are individually liable upon the contract in question under the rule as announced in *Powers v. Briggs*, 79 Ill. 493. In that case the names of the promisors did not appear at all in the body of the instrument, the language being: "We, the trustees of the Seventh Presbyterian Church, promise to pay," etc., while in the case at bar the names of appellants appear in the body of the contract as contracting parties, followed, it is true, by the words, "Directors of District No. 2," etc., but these words can only be regarded as descriptive. There are no words in the contract implying an undertaking on the part of the district. The latter is not assumed to be acting by or through appellants, nor does it appear they are acting for or on behalf of the district.

Williams v. C. & A. R. R. Co.

The language indicates that appellants were directors of the district when they executed the contract, but not that they were acting for and on behalf of the district, or intending to make the instrument the contract of the district. The case is not like that of *New Market Savings Bank v. Gillet*, 100 Ill. 254, for in that case the language used in the body of the note and attached to the signature was the proper corporate name of the society for and in the name of which the signers thereof, as trustees, were acting. The case at bar would have been like that, if the language used had been, instead of the individual names of appellants, the corporate name of the district, viz.: "School Directors of District No. 2," etc.

We do not mean to be understood that the mere omission of the word "school," has changed the liability, for had the contract represented one of the contracting parties as directors of district No. 2, omitting their names from the body of the contract, it might be still regarded as the contract of the district, notwithstanding the omission of the word "school."

The judgment of the County Court will be affirmed.

Judgment affirmed.

CHARLES A. WILLIAMS

V.

CHICAGO & ALTON RAILROAD COMPANY.

Railroads—Statutory Signals—Crossings—Personal Injuries—Adjacent Field.

The plain object of the statute requiring railroad companies to give signals at highway crossings is to protect persons who may be about to cross the track and to obviate danger of collisions. Failure to comply with the statute does not render a company liable to a person injured in an adjacent field by reason thereof.

[Opinion filed February 14, 1890.]

IN ERROR to the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

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Mr. THOMAS F. TIPTON, for plaintiff in error.

Messrs. WILLIAMS & CAPEN, for defendant in error.

WALL, J. The declaration alleged that plaintiff was plowing in a field adjacent to the defendant's railroad track and a short distance from the crossing of a public highway; that a train approached from the northeast and failed to give the statutory signal by sounding whistle or ringing bell for a distance of eighty rods before the crossing was reached; that between the point where the plaintiff was at work and said crossing there was a curve in the track and by reason thereof and of intervening trees and vegetation the train was not visible from plaintiff's standpoint until it had passed the crossing and was quite near him; and because of its sudden appearance and proximity without warning his horses became frightened, causing him to receive a serious bodily hurt.

Liability is predicated upon the assumed duty of the company to give said signal for the warning and protection of the plaintiff under the circumstances stated and upon negligence from the omission to do so. The Circuit Court sustained a demurrer to the declaration upon which ruling error is assigned. The statute reads as follows, Par. 68, Ch. 114, S. & C. Stat. 1935:

"Every railroad corporation shall cause a bell of at least thirty pounds weight and a steam whistle placed and kept on each locomotive engine, and shall cause the same to be rung or whistled by the engineer or fireman at the distance of at least eighty rods from the place where the railroad crosses or intersects any public highway, and shall be kept ringing or whistling until such highway is reached."

The declaration alleges that it was negligence not to give the signal, and by reason of the signal not being given the injury was occasioned, and it seems to be argued that as the demurrer admits the truth of the matter so alleged, it admits negligence. The demurrer admits the truth of all matters of fact which are well pleaded; but not necessarily all conclusions that may be therein drawn from stated facts. The point

here is whether the failure to comply with the statute is negligence with respect to one situated as was the plaintiff.

It has uniformly been held that with respect to persons and animals crossing or about to cross the railroad over the highway the omission to give the signal was negligence and if it occasioned injury at such crossing an action would lie, and in *T. W. & W. R. R. Co. v. Fergusson*, 42 Ill. 449, recovery was sustained where an animal was killed, not on the crossing, but a short distance from it and in the direction in which the train was approaching, in an open unfenced space within the limits of a station. There the court regarded the case as being within the same consideration as though the animal had been on the crossing and seemed to place no little stress upon the provision in the statute then in force that the road should "be liable for all damages which shall be sustained by any person by reason of such neglect." It is to be noted that in the revision of 1874, this clause was omitted.

In *Rowena v. St. P., M. & C. R. R. Co.*, 62 Wis. 178, such a statutory provision was held to afford its protection to a traveler on a highway running parallel with the railroad, and other cases somewhat like the Wisconsin case can be found in other State reports. On the other hand it was held in *O'Donnell v. Providence & C. R. R.*, 6 R. I. 211, that such a statute is intended to protect persons about to cross the railroad at a highway, and can not be made the ground of an action by one who is injured while walking along the railroad track, not at a crossing. A similar view was held in *E. T. V. & G. R. R. Co. v. Feathers*, 10 Lea, 103, where the plaintiff was riding horseback along a highway running near to and parallel with the railroad and was injured by reason of the fright of the horse occasioned by the unannounced appearance of the train. So also in *St. L. & S. F. R. R. Co. v. Paine*, 29 Kan. 160, where the plaintiff's team being near the railroad, but not on or approaching the crossing, was frightened by the train, no signal of its coming being given. *Thompson on Neg.*, Vol. 1, page 452, and cases there cited; *Shearman and Redfield on Negligence*, Sec. 485.

In the case of *W., St. L. & P. R. R. Co. v. Neikirk*, 15

Ill. App. 172, the plaintiff had been working with his team on the right of way of the railroad some distance from a highway crossing and in attempting to cross the railroad at a private crossing the team was run upon by a train which was passing, and it was insisted that because the signal had not been given before reaching the highway crossing there was negligence producing the injury and of which the plaintiff might rightfully complain, as, if the signal had been given, his attention would have been attracted to the approach of the train and the accident thereby avoided; but the court remarked "The statute requiring the ringing of the bell or the blowing of the whistle on approaching a highway crossing was designed for the protection of persons crossing the track on the highway and not for the safety of those crossing at a distance therefrom over private crossings constructed by the railroad for their convenience."

In *C. & E. I. R. R. Co. v. McKnight*, 16 Ill. App. 596, the person injured was riding on a hand car over the defendant's track, and was struck by a train coming in the opposite direction and it was claimed there was negligence in the failure to give the signal before reaching a highway crossing. But the court said: "The deceased was not injured at the crossing and does not come within the meaning of that statute. That statute was intended to protect persons in crossing and has no reference to cases like this where the injury occurred on the railroad track of appellant. The omission to comply with the statute can not in a case like this be set up as a ground of recovery."

The principle involved in the two cases last cited seems to be substantially the same as in the present, and we are content with the conclusions therein. The statute simply makes it the duty of the company to give the signal when approaching a highway crossing. It is to begin at the distance of eighty rods from and to continue up to the crossing. The plain manifest object was to protect by a required warning those who might be about to cross the railroad over the highway, so that the danger of collision at such crossings might be obviated.

Wheeler v. Fishell.

The case of a person working with a team near the railroad, but not about to cross over a highway, who might, or might not, if he heard the signal, have secured his team or got a safe distance away, was evidently not in mind and not intended to be provided for. It would be difficult, if not impossible, to make the statutory provision uniformly useful as to persons situated as was the plaintiff, and in other similar situations. It is practicable to apply it uniformly in all cases at highway crossings.

We think the construction contended for by plaintiff strained, unnatural and not within the intention of the legislature, and that the Circuit Court properly held that no cause of action was disclosed by the declaration. The judgment will be affirmed.

Judgment affirmed.

ALBION WHEELER

V.

ALBERT FISHELL ET AL.

*Sales—Patent Right—Construction of Contract—Acceptance by Parties
Not Signing—Delay—Reasonable Time—Propositions of Law.*

In an action brought to recover a sum named in a contract as the consideration of a deed of the right to an invention within a certain specified territory, this court holds, that under the same, the tender of a deed was necessary to complete the right of action for the sum in question; that the acceptance of the contract by defendants, though without signing it, made it binding on them upon tender within a reasonable time and not a mere option, and that the same was not made within such time.

[Opinion filed February 14, 1890.]

IN ERROR to the Circuit Court of Pike County; the Hon. C. J. SCOFIELD, Judge, presiding.

Mr. J. S. IRWIN, for plaintiff in error.

Unilateral contracts or by deed poll are binding. Bishop on Contracts, 55, 202, 1990; 2 Pars. Contracts, 290, n. 1; Conger v. C. & R. I. R. R. Co., 15 Ill. 366; Esmay v. Gorton, 18 Ill. 483; McFarlane v. Williams, 107 Ill. 33; Flanders v. Merrill, 38 Iowa, 583; Schmidt v. Glade, 126 Ill. 485.

A contract or deed can't not be delivered to the grantee as an escrow. Seely v. Lewis, 5 Gilm. 30; McCann v. Atherton, 106 Ill. 31; Stevenson v. Crapnell, 114 Ill. 19; Baum v. Parkhurst, 26 App. 128; Moss v. Ribble, 5 Cranch, 351.

The words "sell" and "transfer," in an assignment, amount to a deed: Railroad Co. v. Trimble, 10 Wall. 367; and no new deed or additional conveyance is necessary to perfect title. Gaylor v. Wilder, 10 How. 467 and 477; Railroad Co. v. Trimble, 10 Wall. 367.

As the original contract was an absolute conveyance to Fishell & Co., of the territory named, they could not rescind without a tender of reconveyance; even when the first default is on the part of the opposite party, the party wishing to rescind must offer to return what he has received. Stevens v. Bradley, 22 Ill. 244; Graham v. Halloway, 44 Ill. 385; Staley v. Murphy, 47 Ill. 241; Anderson v. White, 27 Ill. 57; Buchanan v. Horney, 12 Ill. 336. The rescission must be *in toto*, and each party placed in *statu quo*. Wolf v. Dietzsch, 75 Ill. 205; Harzfeld v. Converse, 105 Ill. 534; Smith v. Brittenham, 98 Ill. 188.

Messrs. WIKE & HIGBEE and ORR & CRAWFORD, for defendants in error.

WALL, J. On the 22d December, 1883, plaintiff in error executed and delivered to defendants in error the following instrument in writing:

"Whereas, I, Albion Wheeler, of Ridgeway, county of Winnishiek, State of Iowa, have invented a certain new and useful invention, or improvement, in a Loose Draft Equalizer, for which I am about to make application for letters patent to the United States; and whereas, Albert Fishell, W. T. Smith and L. R. Horner, of Pittsfield, county of Pike, and State of

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Illinois, are desirous of acquiring an interest and ownership in said invention, together with any improvements on the same in the letters patent to be obtained therefor in all of the United States except Wisconsin, Minnesota, Dakota, Montana, Wyoming, Idaho, Washington, Oregon, and the five northern tiers of counties in Iowa, and that part of Nebraska, Utah, Nevada and California north of parallel forty-one, north latitude, being the same territory as sold to them this day of a Tongue Evener, under patent No. 241,105. Now, therefore, to all whom it may concern, be it known that for and in consideration of one dollar in hand paid to me, the receipt of which is hereby acknowledged, and an additional \$1,000 to be paid to me upon the delivery of the deed, I, Albion Wheeler, have sold, assigned, transferred and set over, and by these presents do sell, assign, transfer and set over unto Albert Fishell, W. T. Smith and L. R. Horner, the full and exclusive right to said invention, together with all improvements on the same, in the territory named and fully described in the specifications, prepared and executed by me preparatory to obtaining letters patent of the United States therefor.

"Witness my hand and seal this 22d December, 1883.

"ALBION WHEELER. [SEAL]"

Which, as the proof tends to show, was then and there accepted by defendants in error.

The plaintiff in error had then no patent for the invention nor did he make application therefor until May 26, 1885. The patent was issued January 5, 1886.

On the 25th June, 1885, plaintiff in error wrote to defendants in error advising them of the grant of letters patent (which was untrue) and asking when they "would prefer to have the deed issued out of the patent office so as to make the best of it as to time to be ready to work it while it is new." Fishell and Smith testified they received no such communication. Horner was not served and did not appear in the trial below.

On the 24th February, 1886, plaintiff in error executed a deed to defendants in error for the territory named in the contract and caused the same to be tendered not long afterward

to Fishell and Smith, at the same time demanding the money specified in the contract, \$1,000. The payment not being made this suit was brought. The case was tried by the court, a jury being waived, and the issues were found for defendants. Judgment followed accordingly, from which a writ of error is prosecuted to this court by the plaintiff.

It will be noticed the contract specifies no time within which it is to be completed, and in such case the law would imply that it should be within a reasonable time. What would be a reasonable time depends upon circumstances, all of which should be taken into account including the relative situation of the parties and the nature of the subject involved. It is claimed by the plaintiff in error that the contract amounted to an assignment or conveyance of the patent for the territory mentioned and that it was unnecessary to make any other deed or conveyance therefor. The invention at that time was not perfected in the mind of the inventor as appears from the testimony, and the contract provided in express terms that a deed was to be made, when and not before the price was payable, and when and not before, as a necessary consequence, the right of the purchasers would be complete.

Defendants insisted and offered evidence to show that the contract intended merely to give them an option to buy or not at the price named, but as we construe it, the provision was for an absolute sale; and by accepting the contract, though they did not sign it, they became bound by its terms, and were required to pay the price named and take the deed, if tendered within a reasonable time.

If, however, the court trying the case was warranted by the evidence in concluding that the patent was not obtained and the deed therefor was not tendered within a reasonable time in view of all the circumstances, then the defendants were entitled to judgment. And this we consider the vital question in the case, upon the solution of which the whole controversy depends. The application was not filed in the patent office until May 26, 1885, seventeen months from the date of the contract, and the deed was not tendered to defendants until March 7, 1886, more than two years and two months from the

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date of the contract. Considering the evidence as it appears in the record, we can not say the court was without warrant in the view that this delay was unreasonable. On the contrary, we are inclined to agree with such conclusion.

It might well be supposed that ordinary business men would not expect to be held in a state of uncertainty for so long a period—not only keeping the money in readiness but so ordering their other arrangements as to be in condition to take hold of the patent and push it while it was new. More especially might this be difficult and inconvenient, if not wholly impracticable, in the case of three men whose business relations and personal affairs might be greatly changed within such a time. Upon the merits the finding is according to, or at least supported by the proofs.

It is complained that the court modified the first proposition of law presented by the plaintiff by adding the qualification that the deed should be tendered "within the time contemplated by the agreement or within a reasonable time." The modification was right. We find no error in the record and the judgment will be affirmed.

Judgment affirmed.

THOMAS F. HARWOOD ET AL.

v.

WILLIAM J. BROWNELL ET AL.

Mechanic's Lien—Petition to Enforce—Implied Contract—Materials Not Furnished within One Year—Judgment Creditors—Landlord—Priority of Liens—Sec. 3, Chap. 82, R. S.

Upon a petition to enforce a mechanic's lien, it being stipulated that no liens that any of the parties holding claims against the common debtor might have, should be lost or postponed by reason of delay during the pendency of the suit, and that the rights of the respective parties should be determined in the cause, this court holds that the stipulation was a sufficient basis on which to afford relief, and found a decree determining and enforcing the rights of the parties without the necessity of cross-bills, and

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that the decree of the court below denying the petition, was supported by the evidence, the materials in question not having been furnished within one year, as required by Sec. 3, Chap. 82, R. S.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

MESSRS. KERRICK, LUCAS & SPENCER, for appellants Harwood & Son.

MR. MILES K. YOUNG, for appellant E. B. Steere.

MESSRS. A. E. DEMANGE, NEVILLE & LINDLEY and JOHN E. POLLOCK, for appellees.

CONGER, J. T. F. Harwood & Son filed a petition to enforce a lien for lumber and other materials furnished the Bloomington Base Ball Association, which were used in improving the grounds of the association, making fences and an amphitheater. To this petition the association made no defense and was defaulted. Brownell, Tillotson and Wochner answered, claiming the same property by virtue of a chattel mortgage given them on the property by the association, while Mason and Morse answered, setting up a claim to a lien upon the same property by virtue of a judgment and execution against the association. E. B. Steere answered, denying the claim of petitioners and setting up that he was the owner of the land upon which the improvements had been made, and had leased the same to the association, and also claimed that for non-payment of rent it had forfeited the lease, and was entitled to hold said improvements. It was stipulated that no liens any of the parties might have should be lost or postponed by reason of delay during the pendency of the suit, and that the rights of the respective parties should be determined in the cause.

Upon final hearing the court held that Harwood & Son were not entitled to a lien; that Steere's claim was not sustained

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by the evidence; that the chattel mortgage was the prior lien; that the execution in favor of Mason and Morse was the second lien; and the execution in favor of Steere and McLean was the third lien; and made the proper decree to enforce the rights given the respective parties. From that decree Harwood & Son and E. B. Steere both appealed.

T. F. Harwood & Son were not entitled to their lien because more than one year elapsed from the commencement of the delivery of the materials, until they were all delivered. There was no express contract, but the materials were to be furnished from time to time as ordered, and charged for at reasonable prices; hence the contract was an implied one.

Sec. 3, Chap. 82 Rev. Stat., says: "If the work is done or materials are furnished under an implied contract, no lien shall be had by virtue of this act, unless the work shall be done or the materials be furnished within one year from the commencement of the work or the delivery of the materials."

The date of the first delivery of materials was May 22, 1887, while that of the last was May 31, 1888, being more than one year; hence they were not entitled to a lien and the court properly so held. After a careful examination of the record we are satisfied that the decree was warranted by the proofs and should be affirmed.

The stipulation was, we think, a sufficient basis on which to afford the relief and found the decree, without the necessity of cross-bills.

Judgment affirmed.

JESSE B. GOULD

v.

VINTON E. HOWELL.

Replevin—Sale—Conditional Delivery—Unpaid Check—New Trial—Instruction.

A horse attached as the property of another, may be replevied by the person selling him upon the understanding that title should not pass until check given for purchase price should be paid, any time previous to payment.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

MESSRS. KERRICK, LUCAS & SPENCER, for appellant.

MR. JOHN T. LILLARD, for appellee.

WALL, J. This was replevin for a horse brought by appellant against appellee. Judgment was in favor of the latter, who, as sheriff, had levied upon the property under a writ of attachment against one Johnson.

Appellant, being the owner, had agreed to sell the horse to Johnson, but the price, \$225, was unpaid, and it was understood the title should not pass and the sale should not be complete until a check given by Johnson for that sum upon a bank in Missouri should be honored. The horse had been brought by appellant to Bloomington and put in the livery stable of one Millinger, and while this was the place where delivery was to be made, yet the evidence warrants the conclusion that it was not intended to perfect the sale until payment was assured, and that if it can be said there was a delivery it was conditional only, and that Johnson had no right to remove the horse until appellant was satisfied. Pending this situation the levy was made. Under the circumstances, if, at that time, the vendee had assumed the rights of an owner, the vendor might well have maintained replevin against him. It is suggested the vendor could not rescind without returning the check. There was no occasion for rescission. The sale was inchoate and the title and right to possess were in the vendor. It was all conditioned upon the payment of the check, and until then the vendee had no right to take the horse from the stable. His creditors could occupy no better position than he could. *Schweitzer v. Tracy*, 76 Ill. 345.

The appellant was not required to litigate with the Missouri bank as to its liability to pay the check. He could hold his property if it was not paid.

P., D. & E. Ry. Co. v. Duggan.

We are of opinion that the court erred in giving instructions No. 5, 6 and 7, asked by appellee, and in refusing the motion for new trial. The judgment will be reversed and the cause remanded.

Reversed and remanded.

PEORIA, DECATUR & EVANSVILLE RAILWAY COMPANY

v.

MARY A. DUGGAN ET AL.

*Injunctions—Railroads—Judgment—Justice Courts—Jurisdiction of—
Summons—Improper Return—Sec. 21, Chap. 79, R. S.*

Where, in an action against a railroad company in a justice court, the summons was served properly, and judgment was rendered against the company, equity will not enjoin the collection thereof on the ground that the return on the summons was not properly made by the constable.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Moultrie County; the
Hon. E. P. VAIL, Judge, presiding.

Messrs. STEVENS & HORTON and JOHN R. EDEN, for appellant.

Messrs. CONNOLLY & MATHER, for appellees.

WALL, J. This was a bill in chancery filed in the Circuit Court of Moultrie County by the Peoria, Decatur and Evansville Railway Company, to enjoin the collection of a judgment rendered against the complainant in favor of Mary A. Duggan, by a justice of the peace of said county, for \$114 and costs. The bill alleged that the judgment was void because the justice had no jurisdiction of the defendant therein, the supposed want of jurisdiction being based upon an insufficient return of service as it was regarded by the complainant. That return was as follows:

"I served the within summons by delivering a true copy thereof to Thomas E. Mayes, agent of the P. D. & E. Ry. Co., the president of said company not being found in my county," etc.

The bill as amended averred that the complainant was not indebted to said Duggan for any part of the claim upon which said judgment was founded, and that it was never in any manner served with process in said cause, and never had any opportunity to defend against said claim. The bill was answered and the cause was heard upon the merits. A final decree was entered dismissing the bill at the cost of complainant. The record is brought here by appeal, and error is assigned upon the decree. It is urged, first, that the return was insufficient, and therefore the judgment was void.

It is provided by Sec. 21, Chap. 79, relating to proceedings before the justices of the peace, that "An incorporated company may be served by leaving a copy of the summons with its president, secretary, superintendent, general agent, cashier or principal clerk, if either can be found in the district in which the suit is brought; if neither shall be found in the district, then by leaving a copy of the summons with any director clerk, engineer, conductor, station agent, or any agent of such company found in the district." It will be noted that this section differs somewhat from Sec. 4 of Chap. 110, relating to practice in courts of record, which provides for service upon the president if found in the county, and if not, upon any other officer or agent who might be so found. The section relating to practice before justices of the peace seems to require that the service should be had upon the president, secretary, superintendent, general agent, cashier or principal clerk, and if none of these can be found, then upon one of the other officials or agents named, and to make the return good in form when service was had upon one not of the list first named, it should appear that none of these in that list could be found. The return was therefore defective, and upon the face of the record there was, technically at least, no jurisdiction of the defendant in said judgment.

It appears from the evidence that Mr. Mayes, upon whom the writ was served, was the station agent of the company at

Dalton City, where the suit was brought before a justice of that district or precinct; that the president of the company resided in Chicago; that the general offices of the company were in Peoria; that the general officers of the company had their headquarters there, and that they were not at Dalton City on the day the writ was served unless possibly they passed through, and that Mr. Mayes had no recollection of seeing them, or any of them, on said day, and that he sent the copy of summons, which was given to him by the constable, to the general manager of the company. Though the return was informal, there was in fact good service made in the mode and by the officer as the statute provides, and the fact of service was made known to the general manager of the company. Had the company interposed an objection before the justice, the return could have been made formal, but that would have added nothing to the notice the company received. It received the notice which the law requires and it had ample opportunity to make any defense it had to the demand.

Where a judgment is obtained by fraud, accident or mistake, without notice to the defendant, or if he has notice under such circumstances as would render it unreasonable to hold him bound by the notice, and where the judgment is itself unjust and inequitable in whole or in part, equity will grant necessary relief by enjoining so much of the judgment as ought not to be collected. But all these elements must co-exist and it must also appear that the complainant has not been negligent and that his *laches* or omission to protect or defend himself has not materially caused the condition of things of which he complains. In Freeman on Judgments, Sec. 495, the general doctrine as to want of notice is thus stated:

"If it satisfactorily appears that the defendant was not summoned and had no notice of the suit, a sufficient excuse is shown for his neglect to defend and equity will not allow the judgment, if unjust, to be used against him." We quote from Pomeroy's Eq. Jur., Vol. 3, Sec. 1361: "It is not such a special equitable ground of interference that the party has, by his own act or omission, failed to effectually avail himself of a valid defense at law, nor that the court of law has decided

a question of law or fact erroneously;" and again Sec. 1364: "That where the legal judgment was obtained or entered through fraud, accident or mistake, or where the defendant in the action, having a valid legal defense on the merits, was prevented in any manner from maintaining it by fraud, mistake or accident, and there has been no negligence, *laches* or other fault on his part, or on the part of his agents, then a court of equity will interfere and restrain proceedings in the judgment which can not be conscientiously enforced;" and in the note to the latter section it is said that a party seeking the aid of a court of equity must show diligence and that a judgment will not be enjoined for any defense or right which could have been asserted in the court of law.

If the party by the use of diligence could not have prevented the judgment or availed himself of his defense, and has by fraud, accident or mistake had a judgment rendered against him, he must also show that the judgment is in whole or in part inequitable; for if it is not so, equity will not interfere but will let the plaintiff enjoy whatever advantage the judgment may give him. Freeman on Judgments, Sec. 498; C. & St. L. R. Co. v. Holbrook, 92 Ill. 297; Colson v. Leitch, 110 Ill. 504.

We have been referred to no case where, as here, there was really good service, though by an insufficient return it appeared otherwise, and probably no such case can be found.

In the amendment to the bill the complainant alleged "that it never was in any manner served with process and never had any opportunity to defend against such pretended claim;" and thus it states what must be regarded as a necessary condition to the exercise of equitable jurisdiction, that is, that there was no notice and no opportunity of defense.

We are not to be understood as saying that if there had been no attempt at service the defendant would be bound to attend and enter his appearance because he might happen to know that the case was set for trial at a particular time and place. We merely pass upon the case before us, which is that there was due service in fact, but no proper return

thereof. It would not comport with the principles and maxims which prevail in equity that a party who is actually served may allow a judgment to be rendered against him without objection and then seek to be released therefrom on the ground that by the mere mistake or oversight of the officer serving the writ, the return does not show proper service. The neglect of the plaintiff to have such return amended can not help the matter. It is not the course of equity to afford relief on such merely technical grounds, which might have been obviated by the act of the complainant and which did not prevent him from manifesting whatever defense he had. On the contrary, the relief afforded in equity often proceeds upon the ground that by some technical rule an inequitable result has been accomplished. It never proceeds upon the ground of a mere technical objection to legal proceedings where the complainant was not precluded from a legal defense. To grant relief upon the case presented by this record would reverse fundamental principles of equity jurisprudence.

In considering the point of diligence we leave entirely out of view the question whether the judgment might have been set aside upon a common law writ of *certiorari*.

As to the merits of the case we find that excepting one item of \$18.75 the plaintiff had apparently a good equitable, if not a legal demand. As to that item the defense of *res judicata* might properly have been made. To this extent, and perhaps further, the complainant might have successfully interposed objections in the court of law.

That it did not make such resistance was not because it had not the opportunity to do so, upon due notice. In the case of *C. & St. L. R. R. Co. v. Holbrook*, *supra*, it was urged that the judgment was the product of false testimony, but the Supreme Court held it by no means followed that appellant was thereby entitled to relief, saying, "When the railroad company was served with process, if it had a defense, the law required it to appear and set up that defense and establish it by evidence. Had this course been pursued no judgment would have been rendered. But where a party has been served

with process and neglects to appear and defend and suffers judgment to be rendered by default, it has long been settled that a court of equity will not relieve the negligent from such a judgment." *Hendrickson v. Henckley*, 17 How. 443.

We are of opinion that the decree dismissing the bill was right, and it will be affirmed.

Judgment affirmed.

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STEPHEN H. BOWMAN, ADM'R, ETC.,

v.

JOHN NEELY.

Negotiable Instruments—Note—Interest on Interest—Sec. 2, Act of 1874.

A clause in a promissory note, executed in this State, February 12, 1876, providing for "interest payable annually, and if not so paid to become principal and bear the same rate of interest," was not usurious, and was within the contracting power of the parties.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Jersey County; the Hon. G. W. HERDMAN, Judge, presiding.

Messrs. T. S. CHAPMAN and A. M. SLATEN, for appellant.

In the case of *Hoyle v. Page*, reported in 41 Mich. 553, opinion by Justice Cooley, on note providing for payment of \$1,400 on or before ten years after date, "with annual interest at the rate of ten per cent. per annum, and in case said interest is not paid at the end of each year it is expressly agreed that said interest shall become principal and draw interest at the rate aforesaid," which is in substance and effect the same provision relied upon in this case to collect compound interest, the court say: "At the date of this obligation there was no statute in this State expressly providing for the compounding

of interest and it has been generally believed that it was not competent without such a statute to make a valid contract in advance for interest upon overdue installments of interest. Such was the conclusion of Chancellor Kent at an early day." Connecticut v. Jackson, 1 Johns. Ch. 13; Van Bauschooten v. Lawson, 6 Johns. Ch. 314. "And his conclusion seems to commend itself to the judgment of our people, as it did to that of judicial tribunals of other States." Sparks v. Garregues, 1 Binn. 165; Stokely v. Thompson, 34 Penn. St. 210; Hastings v. Wasivall, 8 Mass. 455; Van Hermet v. Porter, 11 Met. 210; Ferry v. Ferry, 2 Cush. 92; Doe v. Warren, 7 Me. 48; Niles v. The Board, etc., 8 Blackf. 159; Grimes v. Blake, 16 Ind. 160; Leonard v. Villars, 23 Ill. 377.

"The judgment of Chancellor Kent has been recently criticized in New York, but it has been affirmed by a majority of the Court of Appeals after full discussion." Young v. Hill, 67 N. Y. 162.

Mr. J. S. CARR, for appellee.

This annual interest was not an open running account, but was a sum certain, due at a definite time, on which, under the statute in force when this note was made, interest was allowable. Alcohol Works v. Sheer, 8 Ill. App. 370; Dobbins v. Higgins, 78 Ill. 442; Ditch v. Vollhardt, 82 Ill. 134; Maltman v. Williamson, 69 Ill. 423; Haight v. McVeigh, 69 Ill. 624; Clark v. Dutton, 69 Ill. 522.

The latter case contained a very clear definition of the two classes, liquidated and unliquidated demand.

~~This~~ ^{the} note and its force and effect is to be adjudicated upon the law in force at its date. Herring v. Woodhull, 29 Ill. 100.

But if the special contract contained in this note is found to be unaffected or uncontrolled by any statute of this State, it is to be enforced strictly according to its terms. Parulee v. Lawrence, 48 Ill. 343.

See further, Gilmore v. Bissell, 124 Ill. 490; Harper v. Ely, 70 Ill. 586; Humphreys v. Morton, 100 Ill. 602; Scott v. Saffield, 37 Ga. 384; Hale v. Hale, 1 Cold. (Tenn.) 233; Brewster v. Wakefield, 1 Minn. 352; Bledsoe v. Nixon, 69 N. C.

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81; Lewis v. Paschal, 37 Tex. 318; Sellick v. French, 1 Am. Lead. Cases, 650; Pawling v. Pawling, Yeates (Pa.), 220; Watterson v. Root, 4 Ohio, 373; Preston v. Walker, 26 Iowa, 205, 213; Mann v. Cross, 9 Ia. 327; Pierce, Ex., v. Rowe, 1 N. H. 179, 3 N. H. 40; Page v. Williamson, 54 Cal. 562; Greenleaf v. Kellogg, 2 Mass. 567; Cattin v. Layman, 26 Vt. 46; Capen v. Crowell, 66 Maine, 282; Craig v. Collender, 2 Minn. 350; Kent v. Brown, 3 Minn. 347; Cramer v. Lepper, 26 Ohio State Rep. 59; Calhoun v. Marshall, 61 Ga. 275; Kennon v. Dickens, N. C. Conference Rep. 357; Taliaferro, Ex'r, v. King, 9 Dana (Ky.), 331; Anktell v. Converse, 17 Ohio State Rep. 11; Brewster v. Wakefield, 1 Minn. 352; Mills v. Jefferson, 20 Wis. 54-65.

CONGER, J. Appellee filed a claim in the Probate Court of Jersey County against the estate of Joshua Neely, deceased, which claim was based upon the following promissory note:

"\$3,381.31.

JERSEYVILLE, ILL., Feb. 12, 1876.

"One year after date, for value received, I promise to pay to the order of John Neely, thirty-four hundred eighty-one 31-100 dollars, with ten per cent. interest from date, at the banking house of Cross, Carlin & Co. Interest payable annually, and if not so paid to become principal and bear the same rate of interest.

"JOHN HOPPER.

"JOSHUA NEELY."

There were certain credits indorsed upon the note. The County Court allowed interest upon the principal alone. The case was appealed to the Circuit Court where judgment was entered for \$5,532.46.

The court computed interest not only on the principal, but also on each annual installment of interest from the time it was due, according to the terms of the note to the date of the judgment. It is this holding of the Circuit Court that is assigned as error.

The authorities upon this question are not at all harmo-

nious. In the case of *Connecticut v. Jackson*, 1 John. Ch. 13, Chancellor Kent says: "Even an original agreement at the time of the loan or contract, that if interest be not paid at the end of the year, it shall be deemed principal and carry interest, will not be recognized as valid. Such a provision would not amount to usury so as to render the contract connected with it illegal and void at law (*La Grange v. Hamilton*, 4 Tenn. Rep. 613, 2 H. Black. 144), but this court certainly, and perhaps a court at law, would not give effect to such a provision."

In the case of *Hoyle v. Page*, reported in 41 Mich. p. 553, opinion by Justice Cooley, on note providing for payment of \$1,400 on or before ten years after date, "with annual interest at the rate of ten per cent. per annum, and in case said interest is not paid at the end of each year it is expressly agreed that said interest shall become principal and draw interest at the rate aforesaid," the court say: "At the date of this obligation there was no statute in this case expressly providing for the compounding of interest and it has been generally believed that it was not competent without such a statute to make a valid contract in advance for interest upon overdue installments of interest. Such was the conclusion of Chancellor Kent at an early day." Quite a number of other courts have followed the views above expressed; other cases make a distinction between a promise to pay interest upon interest, made at the time of the original contract, or after the interest becomes due, holding that the latter can be enforced, while the former can not.

A further distinction is made in some of the cases between an agreement like the one in the note in this case, and when the promise to pay interest is contained in separate instruments or coupons from the principal obligation.

In *Brewster v. Wakefield*, 1 Minn. 352, 69 Am. Dec. 343, the court say: "The rate of interest on money is a proper and lawful subject of contract." * * * "As well might it be said that a tenant, holding over after the expiration of his term, should not pay rent at the rate reserved in the lease under which he entered, * * * as that the

maker of the note under our statute be not liable to pay the rate of interest on his debt overdue, which he, by his promise, agreed it should bear before maturity. They both stand upon the same footing. The tenant refuses to surrender at the expiration of his term, and for that reason he will not pay the rent agreed upon in the lease, and insists upon a right to be discharged by payment of a less rate upon a mere legally implied promise to pay the value of the use and occupation; the maker of a note refuses to pay at maturity, and for that reason insists that he is discharged from his agreement to pay interest, and the payee entitled only to the legal and less rate. Such a principle and rule has never been tolerated between landlord and tenant, and never should be allowed to prevail between the promisor and promisee in a contract for the payment of money. The moral influences and effect of such a rule, if allowed to prevail, are in all respects deleterious and reprehensible. The rule, if applied to contracts made in view of our statute, offers a premium upon bad faith, and allows persons to reap rich harvests of wealth out of their violated promises and forfeited pledges; it allows them to avail themselves of benefits derived from their own wrongs, and to enjoy them. To such a doctrine I can not assent, in whatever form it may arise."

In *Bledsoe v. Nixon*, 69 N. C. Rep., cited in *American Reports*, Vol. 12, p. 24, that court said: "When a certain sum of money is to be paid at a specified time, on failure to pay, the party is to be charged with interest; the price for the use of money, like rent due for land or the hire of a horse, being the money of the one, which the other party is having the use of and should pay for." * * * "When there is an agreement set out in the note for the payment of interest annually or semi-annually, the maker is chargeable with interest at the like rate upon each deferred payment of interest in like manner as if he had given a promissory note for the same amount, is sound on principle. By this mode of computation compound interest is not given, but a middle course is taken between simple and compound interest. By computing interest in this way effect is given to the stipula-

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tion to pay interest at fixed times; whereas, if simple interest be computed, no effect whatever is given to the stipulation in regard to interest, and the court assumes the power to expunge it as surplusage, although it is manifest that the parties intended it to have some effect."

In *Lewis v. Paschal*, Adm'r, 37 Texas, 318, which was an action to recover interest on interest accrued on a promissory note, "payable without defalcation or discount, with interest at the rate of ten per cent per annum payable annually from date," this whole subject is ably discussed, citing *Andrews v. Hoxie*, 5th Texas, and the action was sustained, the court declaring the contract neither usurious nor against public policy, but a proper subject of contract. In 1 *American Leading Cases*, 650, *Sellick v. French*, it is said: 1st. An agreement to pay interest on interest is not usurious nor illegal. 2d. That the better opinion is, that at law, such an agreement made either at or after the time of the original contract will be enforced. 3d. That where there is an express stipulation that interest shall be paid at fixed times, as annually or at the end of each year, even if the principal be due at or before the first installment of interest is due, interest is to be charged upon the interest from the time it is payable.

In the case of *Pawling v. Pawling*, Adm'r, 4 *Yeates' Penn. Reports*, 220, the subject of interest on interest is very ably discussed and the rule announced that a contract like that at bar would be sustained. In 3 *Parsons on Contracts*, 150, it is said: "We are aware of no case in England or in this country, in which a contract to pay compound interest has been held to be usurious so as to become totally invalid." And on page 153 it is said: "And for the reason that this aversion of our law to allow money to beget money, has of late years very much diminished, we do not think it absolutely certain that a bargain in advance for the payment of compound interest in all its facts reasonable and free from suspicion of oppression, would not be enforced at this day in some of our courts."

In *City of Aurora v. West* 7 Wall. 82, the Supreme Court of the United States in passing upon the question whether dishonored coupons should bear interest, say:

"Being written contracts for the payment of money, and

negotiable because payable to bearer and passing from hand to hand as other negotiable instruments, it is quite apparent on general principles that they should draw interest after the payment of the principal is unjustly neglected or refused. Where there is a contract to pay money on a day fixed, and the contract is broken, interest, as a general rule, is allowed, and that rule is universal in respect to bills and notes payable on time." *Gelpcke v. Dubuque*, 1 Wall. 206. In *Mann v. Cross*, 9 Iowa, 327, which was a suit to foreclose a mortgage given to secure a note bearing ten per cent interest, payable annually, the court said: "Was he (the mortgagee) entitled to six per cent interest upon the interest annually due? We think he was. The respondent was under a legal obligation to pay this interest at the end of the year; it was a sum of money then due, without a contract fixing the rate of interest upon it, and for which he might have sued. He was, therefore, bound to pay its legal value which, by our law, in the absence of a written agreement reserving more, is fixed at six cents on the hundred." See, also, *Hersey v. Hersey*, 18 Iowa, 24; *Mills v. The Town of Jefferson*, 20 Wis. 50. In the latter case, the court say: "When a person agrees to pay interest at a specified time, and fails to keep his undertaking, why should he not be compelled to pay interest upon interest from the time he should have made the payment? If he undertakes to pay a sum at a given time, to the owner, and makes default, the law allows interest on the sum wrongfully withheld from the time he should have made such payment." Our own Supreme Court in *Leonard v. Adm'r of Villars*, 23 Ill. 380, uses the following language: "To compute interest upon interest after its maturity, has by all courts, whether exercising equity or common law jurisdiction, been held to be compound interest, and in violation of law. This question has been frequently presented, and, it is believed, uniformly held to be unauthorized. We are not aware of any well considered case which has held there is an implied legal or moral obligation to pay interest upon unpaid interest after maturity."

The case at bar is, however, different from the above, in two particulars. In this case there is an express promise to pay interest upon interest, and in the judgment of the Cir-

cuit Court compound interest was not allowed—interest only being allowed upon the annual interest due upon the principal sum, but none upon such interest accruing upon the annual interest, which would be required to make compound interest.

In *Harper v. Ely*, 70 Ill. 586, the court clearly recognizes the doctrine of the United States Supreme Court, that where installments of interest are evidenced by coupons, interest should be computed upon them, if they are not paid at their maturity. In *Gilmore v. Bissell*, 124 Ill. 490, the court say: "The mortgagors had agreed to pay the interest on the mortgaged debt annually, and it was their duty to observe that agreement; but they failed to pay each year, as the interest became due. When the time, however, came to renew the debt, the mortgagors had the right, if they saw proper, to redeem their agreement, and pay interest on the interest; and their agreement to pay that interest was not illegal, nor did it render the transaction usurious. What was done was but the performance of a contract made by the parties, which they had a right to do."

It appears, therefore, that the Supreme Court of this State has never passed upon the exact question presented by this record, but have held, first, where a note is given with interest payable annually, the payee may sue for and recover the interest at the end of each year. *Walker v. Kimball*, 22 Ill. 537. Second, that where such annual interest is evidenced by coupons, interest should be computed upon them if they are not paid when due. Third, that when interest is not paid according to the agreement of the parties, they may, after such interest accrues, lawfully contract for such interest to bear interest.

We are inclined to think there is no substantial difference in principle, between a note like the one in this case, where the contract to pay a certain sum as interest annually is contained in the same paper with the contract to pay the principal sum, and one where the interest is secured by a separate instrument or coupon. In either case it is all one contract, executed at one time, and we think should be construed the same whether upon one piece of paper or many.

The fact that a coupon may be severed from the principal

note and pass into other hands and thus give different persons rights, should not make any difference in construing the contract when executed, or so long as it remains entire in the hands of the original parties.

Nor do we see any good reason for saying that an agreement to pay interest upon interest may lawfully be made after the original interest is due, but not before. A contract tainted with usury can not be confirmed at any time while any part of the debt is unpaid, because it was illegal to make such contract originally; hence it would seem that if it be illegal to make a contract in advance to pay interest upon interest, it could not be regarded as legal to make such contract after there is a default in the payment of the original interest, as was held could properly be done in *Gilmore v. Bissell*, *supra*.

But when the statute on interest is considered it would seem there can be no doubt that the holding of the Circuit Court was right. Section 2 of the statute of 1874, which was the statute in force when the note was executed, provides: "Creditors shall be allowed to receive at the rate of six per centum per annum, for all moneys after they become due on any bond, bill, promissory note, or other instrument in writing." Section 4 provides "in all written contracts it shall be lawful for the parties to stipulate or agree that ten per cent per annum, or any less sum of interest, shall be taken and paid upon every \$100 loaned, or in any manner due." The latter c'ause, "or in any manner due," seems to include the annual installments of interest in the note before us. They were due at a definite time; it was the duty of the debtor then to pay them, and he had expressly provided at the time of making the note that if not so paid they should become a part of the principal and bear the same rate of interest. The maker of the note was authorized by this statute to make the exact contract that he did, and we see no reason, either in law or morals, why it should not be enforced as the parties made it.

In *Ord on Usury*, 36, it is said that "it is not illegal to stipulate for compound interest, or that interest as it becomes due shall be converted into principal, and carry interest," though by the civil law this was not allowed. The judgment will be affirmed.

Judgment affirmed.

CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY
V.
HENRY FLORENS.

Railroads—Injury to Team—Crossings—Rate of Speed of Train in Absence of Regulation by Ordinance—Contributory Negligence—Failure to Look and Listen.

1. In the absence of legislation or municipal regulation a railroad may adopt such rate of speed for its trains as it deems advisable, providing it is reasonably safe to passengers being transported.

2. It is not the duty of an engine-driver, on nearing a crossing, to stop his train for the purpose of avoiding a collision with a team he may see approaching.

3. In an action to recover from a railroad company for injuries inflicted upon a team at a highway crossing, this court holds that the defendant was not guilty of negligence in the premises, but that the plaintiff was negligent in failing to look for trains before driving upon the track.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Fulton County; the Hon. J. C. BAGBY, Judge, presiding.

Messrs. O. F. PRICE and FREDERICK M. GRANT, for appellant.

Mr. H. W. MASTERS, for appellee.

WALL, J. The appellee recovered a judgment against the appellant for \$110 for injuries inflicted upon his team in a collision with an engine running upon the railroad of appel-

la. The plaintiff was engaged in hauling coal in wagons and on occasion to cross the railroad at a point where, by reason of the up grade of the wagon road, it was necessary to double teams. He had thus taken one wagon over the crossing and while going over with the second, the train came along and collided with the team, killing two mules, and doing some

damage to the wagon and harness. It appears that by reason of the peculiar situation as to embankments, etc., a train coming from that direction could be seen but a short distance by one standing on the track; but that, standing a few feet west of the track, it could be seen for three quarters of a mile or more. Plaintiff claims that he made an observation with the purpose to see whether a train was coming but a few moments before attempting to cross with the second wagon. He could neither see nor hear anything of the sort at that time, and he does not state that he made any further observation. It was a stormy day, cloudy and windy, with some snow. Plaintiff heard no signals until just as the train was upon him. There is no evidence that the usual signals were not given, nor that any one who was listening, or might have heard them if given, did not hear them. Incidentally two witnesses who were on the train speak of hearing the whistle sounded just before the collision, which was all the plaintiff heard.

On the part of appellant five witnesses—all trainmen—testified that the whistle was sounded for the crossing at the proper place, one-fourth of a mile before reaching it, and it also appears that the bell, which was of more than thirty pounds weight, was rung by steam from the time of leaving the last station, about two miles. It may therefore be said there is no question that the bell was rung, and upon the evidence there can scarcely be any question that the whistle was sounded, as required by law, before the train reached the crossing. Hence, the plaintiff must recover, if at all, upon the allegation found in the first count of his declaration, that the engine and train were carelessly and negligently driven and managed, thereby causing the collision. Upon this allegation the plaintiff seems to rely, and it was prominently presented to the jury in the instructions given by the court at his instance. In support of this allegation proof was offered as to the speed of the train. Two witnesses who were riding in the caboose (it was a freight train) testified that the speed was extraordinary, thirty-five or forty miles per hour, as they supposed.

It appears that the train ran a considerable distance, possibly a half mile, according to plaintiff's estimate, beyond the crossing before it stopped. It then backed up to the crossing. There was a down grade at the place. The trainmen put the speed at eighteen or twenty miles per hour, and say that it was a down grade; that it was usual to apply the brake on the rear car before starting down the hill, and that it was done on that occasion, and that as soon as the team was discovered going, or about to go, on the track, the stock alarm was sounded and every effort was made to avoid a collision. As there was a bridge and an embankment just beyond the crossing, it is difficult to believe that the engineer and fireman would neglect anything in their power to avert the evident risk of a collision at a place of such danger.

The whole case is thus narrowed down to the speed of the train and the measure of negligence that may be predicated thereon. According to the estimates of the various witnesses the speed was somewhere between eighteen and forty miles per hour. There was no legal provision regulating the rate of speed at that place.

As was said by the Supreme Court in *C., B. & Q. R. R. Co. v. Lee*, 68 Ill. 582, "There is nothing in the charter of the company nor in the general laws of the State, which impose any restraint as to the speed its trains may run.

"Where not prohibited by municipal regulations it is apprehended the company may adopt such rate of speed as it shall deem advisable, provided always it is reasonably safe to the passengers being transported. It will be subject to no liability for the rate adopted if not otherwise at fault."

To the same effect see *W., St. L. & P. Ry. v. Neukirk*, 13 Ill. App. 387; *Same v. Same*, 15 Ill. App. 172. If it be said if the train had been running at a lower rate of speed it could have been stopped in time to prevent the accident, we think the answer is that whether going at the highest or lowest estimated rate it would have been impossible to have stopped after the team was discovered to be in danger.

In *C., B. & Q. R. R. Co. v. Damrell*, 81 Ill. 453, the Supreme Court remark: "This court has frequently asserted

the doctrine that it is not the duty of the engine driver on nearing a road crossing to stop his train for the purpose of avoiding a collision with a wagon and team he may see approaching the crossing." Hence there would have been no duty to stop or attempt to stop until the team was seen to be going on the track and in danger, and if, when it so appeared, no possible effort would be sufficient to stop and avoid the collision, then there would be no negligence in that respect.

We are unable to see how the rate of speed, if too great, can be regarded as the proximate cause of the accident. Again it is difficult to see how the plaintiff can be considered as in the exercise of ordinary care. It was a crossing of more than ordinary danger because an approaching train could not readily be seen from every portion at or near the track though, as already stated, by slight effort it was possible to get a view up the track for at least three quarters of a mile, and while the plaintiff said he had recently made an observation he had not done so just before he attempted to cross.

Since making that observation he had gone to the wagon and in attaching the extra team thereto he had been delayed by a difficulty in adjusting the connection so that some appreciable time, no one knows how long, had elapsed before starting to cross. That lapse of time was certainly more than enough to enable a train going at any ordinary speed to cover the space of track which was visible from any attainable point. Common prudence would have required that he again look before attempting to cross the track, going up hill with a heavily loaded wagon drawn by four horses. It was certainly within his power to have been perfectly safe and no reasonable excuse appears for his omission to protect himself by again looking and being sure that no train was near. It was his duty to do so. Upon this point see C., B. & Q. R. R. Co. v. Damrell, *supra*, and the numerous cases there cited where the omission of such precaution is on the facts then in proof declared to be gross negligence.

We think, under all the conditions here in proof and in view of the plaintiff's familiarity with the location and danger, such omission was highly negligent in this instance. After

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making all due allowances for the weight to be given to the verdict we feel constrained to say that the evidence clearly fails to show negligence on the part of the defendant and ordinary care on the part of the plaintiff. It is not a conflict of evidence, but a want of evidence in these particulars. The judgment will be reversed and the cause remanded.

Reversed and remanded.

THE AMERICAN INSURANCE COMPANY, FOR USE, ETC.,
V.
SAMUEL ARBUCKLE.

Limitations—Statute, Sec. 15—Justice of Peace—Judgment of.

An action on a judgment of a justice of the peace falls within the provisions of Sec. 15 of the statute of limitations and is barred in five years.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Edgar County; the Hon. C. B. SMITH, Judge, presiding.

This was a suit commenced by appellants before George M. Jeter, a justice of the peace of Edgar county, on January 7, 1889, to recover a judgment upon a former judgment rendered January 22, 1879, by M. H. Ewers, a former justice of the peace of Edgar county, against Samuel Arbuckle and in favor of the American Insurance Company. Judgment was rendered by Jeter, January 21, 1889, against appellants, and an appeal was taken to the September term of the Edgar Circuit Court. The cause was then tried before a jury, and after hearing all the evidence, the court instructed the jury to render a verdict for the defendant, upon the ground that appellants had not commenced this action before Justice Geo. M. Jeter within five years from date of former judgment obtained before Justice M. H. Ewers, and in accordance with such instructions the jury so rendered a verdict.

Motion for new trial having been entered, overruled and judgment entered in accordance with the verdict, this appeal was taken.

Messrs. F. W. DUNDAS and J. C. FICKLIN, for appellant.

Mr. H. VAN SELLAR, for appellee.

WALL, J. The question presented by this record is whether an action on a judgment of a justice of the peace is barred by the statute of limitations in five years.

It is provided by Sec. 15, Chap. 83, R. S., that "actions on unwritten contracts expressed or implied, or on awards of arbitration, and all civil actions not otherwise provided for, shall be commenced within five years next after the cause of action accrued." Sec. 16 provides, "actions on bonds, promissory notes, bills of exchange, written leases, written contracts or other evidences of indebtedness in writing shall be commenced within ten years next after the cause of action accrued." By Sec. 26 the period of limitation in actions on judgments of courts of record in this State is twenty years.

A judgment of a justice of the peace not being a judgment of a court of record, does it fall within Sec. 15, which includes "all civil actions not otherwise provided for," or within Sec. 16 under the clause, "other evidences of indebtedness in writing"?

Under the English statute of 21 James I, and similar statutes in this country limiting actions of debt founded upon "any contract, without specialty," it has generally, if not always, been held that the statute of limitations does not bar an action upon a judgment, and so where the liability of defendant arises, not by the act of the parties but by virtue of some requirement of a statute, there is no such bar. The distinction is drawn between actions upon contracts in fact and contracts in law.

It has been held in New York, New Hampshire and Pennsylvania that the judgment of a justice of the peace was not within such a statute, which barred only actions founded upon

any contract, without specialty, thus distinguishing such judgment from a mere contract. Angell on Limitations, Ch. 10; Wait's Ac. & Def., Vol. 7, 253. In Bemis v. Stanley, 93 Ill. 230, it was held that a judgment of a court of record of another State was within the clause of Sec. 15 above quoted.

The court did not refer to Sec. 16. It was then said "our view is that Sec. 15 is broad enough to embrace the judgment sued on in this case; that the suit on a judgment is a civil action not otherwise specially provided for and hence barred in five years by the terms and conditions of our statute." In Aarvig v. Kellogg, 21 Ill. App. 530, it was held by the Appellate Court of the Second District that such a judgment as here involved is to be classed under the head of "other evidences of indebtedness in writing" and therefore controlled by Sec. 16, it being considered that Bemis v. Stanley was not conclusive because involving merely the judgment of a court in another State and because the decision there might have been sustained on the ground that more than ten years had elapsed, and further the attention of the court had not been called to Sec. 16. The same court so held in O'Donnell v. C. & A. R. R. Co., 22 Ill. App. 233.

In Stelle v. Lovejoy, 23 Ill. App. 575, it was held by the Appellate Court of the First District that the action was barred in five years, citing Bemis v. Stanley. We are inclined to the same view.

The sixteenth section enumerates bonds, notes, bills, written leases, written contracts, and then adds "other evidences of indebtedness in writing."

"It is said to be a good rule of construction that where an act of Parliament begins with words which describe things or persons of an inferior degree and concludes with general words, the general words shall not be extended to any thing or person of a higher degree; that is to say, where a particular class is spoken of and general words follow, the class first mentioned is to be taken as the most comprehensive and the general words treated as referring to matters *ejusdem generis*, with such class, the effect of general words, when they follow particular words, being thus restricted." Broom's Legal Maxims, 651; Sedgwick on Stat. and Const. Law, 360-1.

Here the statute having specially enumerated several particular kinds of voluntary obligations, including the more general expression "written contracts," uses the language under consideration, obviously intending to include every other form of voluntary written acknowledgment, admission or undertaking, which might give evidence of indebtedness.

A judgment does evidence indebtedness, but it does more; for it is an adjudication even though rendered by a court of inferior jurisdiction, if acting within its proper limits as to person and subject-matter. It may rest upon contract or upon tort, or upon a provision of statute or of a municipal ordinance. It does not necessarily depend upon any voluntary act of the defendant. Indeed, it may be and often is based upon considerations wholly independent thereof. Moreover it is conclusive, and its merits, while it remains in force, can not be collaterally examined or inquired into.

It would be a misuse of terms to describe it as a mere evidence of indebtedness. It is not to be supposed that the legislature, familiar with the legal effect and qualities of a judgment, would refer to it in terms which more aptly describe something less conclusive and less potential, and which inaptly and imperfectly characterize it by a designation of its minor quality only.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

ROBERT BURGESS ET AL.

V.

CHARLES CAPES, FOR USE, ETC.

Garnishment—Statutes—Construction of—Choses in Action.

The expression, "choses in action" in the provisions of the statute in regard to garnishment, refers only to those in the custody, charge or possession of the garnishee belonging to the defendant, and held against third parties.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of McLean County; the
Hon. A. SAMPLE, Judge, presiding.

Messrs. EDWARDS & EVANS, for appellants.

Messrs. KERRICK, LUCAS & SPENCER, for appellee.

CONGER, J. On the 8th day of March, 1886, appellant sold to **Charles T. Capes** a stallion, and delivered to him the following instrument:

"**Bill of sale of Pride of Maplethorp**:—This is to certify that **we** have sold the imported shire stallion, **Pride of Maplethorp**, to **Mr. C. T. Capes**, of Pontiac, Ill. This also certifies that **the** above mentioned stallion, **Pride of Maplethorp**, was imported from England on the steamship **Lake Huron**, by the **Burgess Bros.**, of Wenona, Ill. This also certifies that the above mentioned stallion is free from all hereditary diseases, and **is a breeder**, and in case said stallion proves contrary in a reasonable time, say two years, if no mishaps allay him, we agree to take said stallion back and furnish the buyer another stallion of same value as the above stallion, provided the said stallion, **Pride of Maplethorp**, is returned to us in good condition.

"**BURGESS BROS.**, Wenona, Ill.

"**Dated Wenona, March 8, 1886.**"

In **April, 1889**, **Haynes, Gorden & Co.** recovered in the Circuit Court of McLean County, a judgment against said **Capes** for \$2,000, and after execution had been issued thereon, and returned no property found, they proceeded, under the statute, to summon appellants as garnishees.

Interrogatories were filed and answered and the cause was tried by a jury, resulting in a verdict against appellants of \$1,875, upon the theory that said stallion was not a good breeder; the warranty in the bill of sale had been broken, and therefore appellants were liable to **Capes** for damages, and that such liability on the part of appellants to **Capes** was a proper subject of garnishment in favor of **Haynes, Gorden & Co.** Appellants insisted in the court below, and contend

here, that the claim of Capes against appellants was for unliquidated damages, and they were not liable as garnishees.

It can not be doubted that the general rule is, that where the claim of the defendant against the garnishee rests in unliquidated damages, the garnishee can not be made liable. Drake on Attachment, Sec. 548; Waples on Attachment, page 197.

In Sec. 544 in Drake on Attachment, it is said: "That which the garnishment operates upon in this class of cases, is credits. The term credits, in this connection, is used in the sense in which it is understood in commercial law, as the correlative of debt."

But it is insisted by counsel for appellee that these general principles have no application in this State, because our statute, unlike those of others, includes choses in action as subjects of garnishment.

A chose in action is thus defined: "A right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with a contract, but which can not be enforced without action." Chap. 62, R. S., Sec. 5, provides that upon a person being summoned as a garnishee, that interrogatories shall be filed, "and compel the answer of any and every garnishee touching the lands, tenements, goods, chattels, moneys, choses in action, credits and effects of such defendant, and the value therefor in his possession, custody or charge, or from him due and owing to the said defendant." The language of Sec. 21 of the Attachment Act, which provides for summoning garnishees in original attachments, directs that the sheriff shall summon as garnishees all persons "whom the creditor shall designate as having any property, effects, choses in action or credits in their possession or power, belonging to the defendant, or who are in anywise indebted to such defendant."

The question arising upon this record is the construction of these sections, for we assume they must be construed together and are both intended to make one summoned as a garnishee liable to the same extent whether summoned as such in an attachment proceeding, or under the provisions of the chapter on garnishment.

The first section of this chapter provides that the court or justice of the peace, "shall examine and proceed against such garnishee or garnishees in the same manner as is required by law against garnishees in original attachments," while the first part of Sec. 5 already referred to, by its language plainly refers to cases where one is summoned as garnishee in an original attachment proceeding or by garnishee summons issued out of a court of record.

Does the language of Sec. 5 mean choses in action belonging to the defendant against third parties, the evidence of which may be in the possession, custody or charge of the garnishee alone, or does the language, "or from him due and owing to the said defendant," include choses in action which the defendant may hold against the garnishee? So far as we are advised there has been no adjudication upon this point. After carefully considering the various provisions of the statute we have reached the conclusion that the expression "choses in action," refers only to those in the possession, custody or charge of the garnishee belonging to the defendant, and held against third parties. This, we think, is apparent, first, from the fact that in the attachment act, which, as we have said, intends to give the same remedy against the garnishees, the language used is, "or who are in anywise indebted to such defendant," thus showing that the legislature intended no departure from the general rule as to what is subject to garnishment, except to make the garnishee answer as to effects of any and every kind of the defendant in his possession, custody or charge.

By Sec. 20 and succeeding sections of Chap. 62, it is provided that when any garnishee has any goods, chattels, choses in action, or effects, other than money, belonging to the defendant, he shall deliver them to the officer holding the execution and he shall sell them and apply the proceeds, etc.; and by Sec. 24 the court may "authorize the garnishee to collect any choses in action, and account for the proceeds."

Thus it is seen if the term "chose in action" as used in Sec. 5, includes those held by the defendant against the garnishee, he may be required to sue himself, which is an absurdity, or by

the other sections he may surrender to the officer, to have sold, the defendant's claim upon him for damages for a violation of a contract, which is equally as absurd. Again the words, "or from him due and owing to the said defendant," clearly do not apply to all the specific things mentioned as being in the possession of the garnishee, and must be restricted to those to which the words would properly apply. One can not be said to owe credits or effects, but may owe goods or money; so we think it can not be said that one owes to another a chose in action, or, as defined, a right to recover a debt, or as Blackstone defines it, the recompense one is entitled to recover as damages for a violation of a contract. In the case at bar appellants may owe Capes money for a violation of their warranty, but it is absurd to say they owe him the right to recover it in an action.

We are inclined to think, therefore, that the rules already quoted from Drake and Waples are applicable to the facts of this case, and that appellants were not liable as garnishees upon the bill of sale. There is another view of this bill of sale which, to our minds, shows the difficulty there is in attempting to hold appellants liable as garnishees in this proceeding. It is insisted by counsel for appellee that "Capes had the right under the contract, to chose either of two remedies, if the horse proved not to be a breeder. He could sue for the breach, or could demand another horse. The remedies were cumulative and not dependent upon each other." Admitting, without intending to decide the question, that this position is correct, by what authority do appellees in this case take it upon themselves to elect for Capes as to which remedy he will pursue? How can they assume that Capes would not prefer to return the horse and take another in its place?

It is no answer to say that it is shown in this case that Capes made an unsuccessful effort to return the horse, and was therefore compelled to rely upon an action for breach of warranty, for while it may be true in this particular case that the wishes of Capes and appellees coincided, they might not in all cases, and to sustain this action it must be assumed in all

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similar cases when one has an election like that claimed for Capes, his creditors, and not he, must determine what it shall be.

The judgment of the Circuit Court will therefore be reversed.

Judgment reversed.

THE CHICAGO, BURLINGTON & QUINCY RAILROAD
COMPANY

V.

THE CITY OF QUINCY.

Railroads—Injunctions—Streets—Obstructions in—Deed—Decree—Evidence—Sufficiency of—Rights of Public.

1. A city is powerless to confer a right so to use its streets as to hinder or obstruct the concurrent use by the public thereof.
2. While statutes of limitation do not run against municipal corporations as to public rights, the principle of estoppel *in pais* may be so applied.
3. In an action brought to enjoin a railroad company from placing obstructions in certain portions of city streets, the deed under which the company claimed the right to act in the premises containing a provision that they, or portions thereof in which any right and privileges were to the company, should be by them so graded and their tracks so that carriages, wagons, drays and vehicles of all kinds might conveniently cross the same, it is *held*: That the decree in behalf of the plaintiff was within the provisions of the deed, and that the same was supported by the evidence.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Adams County; the
Hon. WILLIAM MARSH, Judge, presiding.

Messrs. J. F. CARROTT and O. F. PRICE, for appellant.

Equity never interferes where there is a plain and adequate remedy at law. *Schurmeier v. St. Paul & P. R. R. Co.*, 8 Minn. 113; *Hodgkinson v. L. I. R. R. Co.*, 4 Edw. Ch. 411; *Goodell v. Lassen*, 69 Ill. 145; *Mills v. Parlin*, 106 Ill. 60.

Bill alleging that trespasser is about to commit irreparable injury must allege his insolvency, or otherwise it will be dismissed. There is no allegation of that kind in the bill filed in this cause. *Gause v. Perkins*, 3 Jones' Eq. 177; *Owens v. Crossett*, 105 Ill. 354; *Thornton v. Roll*, 118 Ill. 350.

A court of chancery will not assume jurisdiction to control the use of a street in a city by a railroad company, or the manner in which the track is laid, etc. *C. & V. R. R. Co. v. The People*, 92 Ill. 170; *Mills v. Parlin*, 106 Ill. 60, and cases cited; *The City of Waterloo v. The Waterloo St. Ry. Co.*, 71 Ia. 193.

To warrant the court in issuing an injunction strong *prima facie* evidence of the facts on which the complainant's equity rests must be presented to the court, as well as a full and candid disclosure of all the facts. 1 High on Inj., Section 11; 2 High on Inj., Section 1575; 2 Joyce on Inj., page 1034; *Reddall v. Bryan*, 14 Md. 444; *Johnston v. Glenn*, 40 Md. 207.

A party is precluded from an injunction after long acquiescence; *Kerr on Inj.*, 348; *Hilliard on Inj.*, 24; 1 High on Inj., Sections 618 and 643; *Carpenter v. Carpenter*, 70 Ill. 457, 463; *Vail v. Mix*, 74 Ill. 128; *Higbee & Riggs v. C. & A. R. and T. Co.*, 5 C. E. Green, 442; *Greenhalgh v. Manchester & B. Ry. Co.*, 1 Ry. Ca. 680; *S. C. in 3 Myl. & C.* 784.

Estoppel *in pais* applies to a municipal corporation. *C. & N. W. Ry. Co. v. The People ex rel.*, 91 Ill. 254; *Martel v. City of East St. Louis*, 94 Ill. 69.

For an obstruction to a public highway an injunction is not a favored remedy, whether sought by the public or an individual. *Irwin v. Dixon*, 9 How. (U. S.) 10.

The fee of the streets in Quincy, Illinois, being in the city, it follows that the city of Quincy had full authority to authorize the railroad company to lay down railroad tracks in said streets, and to operate engines and cars thereon. *Stetson v. C. & E. R. R. Co.*, 75 Ill. 74; *Patterson v. C. D. & V. R. R. Co.*, 75 Ill. 588; *Peoria & R. I. R. R. Co. v. Schertz*, 84 Ill. 135; *Truesdale v. Grape Sugar Co.*, 101 Ill. 561.

Messrs. W. G. FEIGENSPAN, City Attorney, and CARTER, GOVERT & PAPE, for appellee.

C., B. & Q. R. R. Co. v. City of Quincy.

The jurisdiction of a court of equity to restrain by injunction at the instance of a city the placing of encroachments or obstructions on public streets and highways is well established. *Metropolitan City Ry. Co. v. Chicago*, 96 Ill. 620, and numerous cases there cited; *Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540; *Town of Burlington v. Schwarzman*, 52 Conn. 181; *S. C.* 52 Am. Rep. 571; *Huddleston v. Killbush Township*, 7 At. Rep. (Pa.) 210; *Board of County Com. v. St. Cloud*, etc. *Ry. Co.* 32 N. W. Rep. (Minn.) 91, and cases cited; *Inhabitants of Watertown v. Mayo*, 109 Mass. 315; *Cheek v. Aurora*, 92 Ind. 107; *Taunton v. Taylor*, 116 Mass. 254; *Cobb v. I. & St. L. Ry. Co.*, 68 Ill. 233; *Dill. Mun. Corp.* (3d Ed.) § 405 n. 2, § 659, § 660 notes 1 and 4, § 662 n. 1, § 706 n. 1; *High on Inj.*, § 819 and § 768, and cases there cited.

Although it is a legitimate use of a street of a city to permit railroad tracks therein, yet such use must be consistent with the public interests in them, and neither a city nor the State Legislature can confer upon any one a right to their exclusive use or a right to so use them as to hinder or obstruct the public in a concurrent use of them. *St. L., A. & T. H. R. R. Co. v. City of Belleville*, 20 Ill. App. 580, and cases there cited; *Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540; *Stack v. East St. Louis*, 85 Ill. 377; *Pitts.. Ft. W. & C. Ry. v. Reich*, 101 Ill. 157; *Chicago Dock & Canal Co. v. Garrity*, 115 Ill. 155; *City of Morrison v. Hinkson*, 87 Ill. 587; *City of Quincy Jones*, 76 Ill. 231.

The decree granting the injunction is not too broad. It will be construed with reference to the claim of right, and the fair construction of the injunction is that the defendant shall not so obstruct the streets in question, or so grade, improve or use them in operating its road as to prevent their unobstructed use by the public as public thoroughfares. *City of Quincy v. Bull*, 106 Ill. 337.

CONGER, J. This was a bill in chancery filed by the city of Quincy against the railroad company, praying for an injunction to restrain the latter from placing certain alleged obstructions in those portions of Broadway and Spring streets, in the city of Quincy, which lie west of the west line of Front street.

Broadway and Spring streets are alleged in the bill to be two of the principal streets of the city running east and west, terminating at their western ends at the edge of the Mississippi river, and forming two of the approaches to the river and landing thereon, and for years have, by a natural gradual descent, extended to the river's edge, making it possible for footmen, horsemen and vehicles to pass and repass from the edge of the river up and over said streets to the city, and that such streets have been so used by the public for a long time.

Appellant filed its answer, relying first upon a deed executed by the Northern Cross Railroad Company as party of the first part, and the city of Quincy as party of the second part, containing many mutual grants, covenants and agreements in reference to the use and occupation of certain ground upon the river front, which we do not think necessary to notice in detail, but one clause of which is as follows :

"And the said party of the second part also grants to the said party of the first part the right and privilege of grading, improving and using that portion of Broadway street which lies west of the west line of Front street, and also that portion of Spring street which lies west of the west line of Front street to the Mississippi river, to suit the convenience of said company, and to construct thereon such railroad tracks, side-tracks, switches and frogs, as the said parties of the first part may desire, and to use the same in the passage of machinery and cars to and fro, or in permitting them to remain thereon, as the convenience of the company may require in the transaction of their business, but without any right to erect on said parts of said streets any building or buildings, or to otherwise appropriate any part thereof to private use, except as hereinbefore stated, and these portions of Broadway and Spring streets, and all other streets in said city, not herein conveyed, in which any rights and privileges are herein granted to said parties of the first part, shall be by them so graded, and the railroad tracks so laid, that carriages, wagons, drays and vehicles of all kinds may conveniently cross the same."

It also avers that by reason of certain foreclosure proceedings it has succeeded to all the rights and privileges of said Northern Cross Railroad Company, which have been repeat-

edly recognized by the city; also that it has, for more than twenty years, constructed tracks, switches, etc., over and across those portions of Broadway and Spring streets lying west of the west line of Front street, under and by virtue of the rights and privileges granted in said deed; and in reference to the question at issue, the answer says that at the time of the commencement of this suit it was preparing and intending to commence and complete the laying of another railroad track, side-track or switch, over and across said Broadway and Spring streets, which lie west of the west line of said Front street, and nearer the said Mississippi river or said "Quincy Bay," than any other railroad track or side-track heretofore laid over and across said parts of said streets, and before laying said railroad track or side-track, it was necessary to throw up and construct a small embankment over and across said streets and north and south of said streets, on which to lay said railroad tracks or side-track, so as to prevent the water from said Mississippi river and from said "Quincy Bay" overflowing said track and said ground; and the defendant says that the laying of said railroad track, side-track or switch was and is essential to the use, maintenance and operation of defendant's said railroad, but this defendant denies; that in constructing said embankment of earth, cinders, sand and gravel, and other material, over and across those portions of Broadway and Spring streets in said city of Quincy which lie west of the west line of said Front street, it will hinder and prevent the use of said streets or any part thereof by the citizens of said city of Quincy, or by the public at large, and it denies all and any purpose and intention to obstruct said portions of said Broadway and Spring streets in any material respect by the location and construction thereon of its said railroad track, side-track or switch; on the contrary, said defendant avers and states that its design and intentions are and were to so construct and lay its said railroad track or side-track thereon that carriages, wagons, drays and vehicles of all kinds might conveniently cross the same; and the defendant, in fact, insists that the use and occupation of said streets, or parts of said streets, for the purpose of laying the railroad track therein, is the lawful and proper appropriation of said parts

of said Broadway and Spring streets to the legitimate purposes of a street or highway; and that, by authorizing such use thereof, the legislature but regulated the mode and means of using and enjoying the public easement therein, and does not in any manner appropriate, dispose of, or interfere with, the ultimate rights of the owners of the fee of the land in said streets or parts of said streets, or the rights of the owners of lots or blocks lying near or contiguous to said parts of said streets.

The Circuit Court rendered a decree in which the findings recite the history of the use and occupation of these grounds and many other things which we do not regard it necessary to set forth in detail, but upon the real question at issue the decree is as follows: "And the court further finds that the equities of this case are with the complainant, and that all of the material allegations of complainant's bill of complaint are true as therein alleged. It is therefore ordered, adjudged and decreed by the court that the said defendant, the Chicago, Burlington and Quincy Railroad Company, its officers, agents, attorneys, servants and employes be, and they are, and each of them is, hereby perpetually enjoined and restrained from depositing any stone, earth, cinders, gravel or other materials upon, or from so erecting any embankment or other obstruction upon, and from so grading said parts of Broadway and Spring streets, or either of them, extending from said Front street to the Mississippi river, or the said bay, or from so laying any railroad tracks thereon, and from otherwise so appropriating the said parts of said streets to defendant's use, and from so obstructing the same as to prevent the free use and enjoyment thereof by the public as public streets of said city, to and from the said river or body of water, or in such manner as to prevent the landing of steamboats and other water crafts plying upon said river and body of water, or in such a manner as to destroy and impair the use of the same as public levees or landings, or in such a manner as to prevent wagons, vehicles, carriages or the public from crossing and recrossing continually along said parts of Spring and Broadway streets, west of Front street, to and from the said river or body of water, or in such a manner as to prevent the citizens of Quincy and

public at large from having the free and unobstructed use of said parts of said streets as public streets in said city of Quincy, or from interfering with the complainant in the use thereof as such public streets, and from the erection and construction of the said obstruction or embankment upon and across said parts of said Spring and Broadway streets as aforesaid, mentioned in said bill and hereinbefore mentioned, and from otherwise obstructing, or further obstructing said parts of said Broadway and Spring streets, and either of them, in any manner so as to prevent or hinder the free and convenient use of said parts of said streets by the complainant and the citizens of said city of Quincy and the public at large as such public streets of said city. And it is further ordered by the court that the people's writ of injunction issue out of this court against the said defendant, its officers, agents, attorneys, servants and employes perpetually enjoining and restraining them, and each of them, as aforesaid in this decree provided."

We think this decree is fully warranted by the evidence in the case, nor is it inconsistent with the conditions of the deed of the city of 1855. By the terms of this deed it is provided that "the portions of Broadway and Spring streets, and all other streets in said city not herein conveyed, in which any rights and privileges are herein granted to said parties of the first part, shall be by them so graded and the railroad tracks so laid that carriages, wagons, drays and vehicles of all kinds may conveniently cross the same." By the decree appellant is enjoined from depositing materials upon, or from so erecting embankments or obstructions upon, and from so grading said streets, or from so laying tracks thereon or obstructing the same, as to prevent the free use and enjoyment thereof by the public as public streets, or to destroy or impair the use of the same as public levees or landings, or to so construct their embankment as to prevent wagons, vehicles, carriages or the public from crossing and recrossing continually along said streets to and from the river.

While the language of the decree is much more voluminous than that of the deed, they both mean substantially the same thing, and that is, that the railroad company in constructing any of its tracks across these streets, shall do so with a

due regard to the right of the public to use them as public highways, and use the ends of them, where they lie upon the margin of the river, for any public purpose which may be useful and proper to the public. By this decree, appellant is left at liberty to construct as many tracks and make as many embankments as it may desire, provided, in doing so, it keeps these streets in such a condition that the public can also use them.

Counsel for appellant, in their brief, say: "We ask, has the defendant company the right and privilege to grade, improve and use these parts of said streets to suit the convenience of said company, and to construct thereon such railroad tracks, side-tracks, switches and frogs, as the said company may desire, and to use the same in the passage of machinery and cars to and fro, or in permitting them to remain thereon, as the convenience of the company may require in the transaction of its business."

We have no hesitation in answering that it has not. It is expressly withheld from them in the deed upon which they rely, and were it not, the city would be powerless to confer a right to so use its streets as to hinder or obstruct the public in a concurrent use of them. *Stack v. E. St. Louis*, 85 Ill. 377; *St. L., A. & T. H. R. R. Co. v. Belleville*, 20 Ill. App. 580; *Dillon on Municipal Corporations*, Sec. 541; *Chi. Dock & Canal Co. v. Garrity*, 115 Ill. 155.

Neither do we find anything in this record that should be regarded as an estoppel against the city asserting its right to the reasonable use by the public, with appellant, of these streets.

While statutes of limitations do not run against municipal corporations as to public rights, the principle of estoppel *in pais* may be applied even against public rights, where all the circumstances of the case equitably require it. We find nothing in the facts of this case requiring the application of this principle, and have been unable to discover in this decree anything unjust or unreasonable toward the rights of appellant.

Believing, as we do, that the decree is equitable, and supported by the evidence, it will be affirmed.

Judgment affirmed.

ALEXANDER T. MILLER

V.

THOMAS W. DYAS, ADMINISTRATOR DE BONIS NON, ETC.

Partnership—Dissolution—Bill—Decree.

Upon a bill filed to settle a partnership, this court is unable to determine from the record the basis upon which the trial court decided certain questions presented and therefore reverses the decree and remands the cause with directions, to the end that the matters in dispute may upon another trial be finally disposed of.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Adams County; the Hon. WILLIAM MARSH, Judge, presiding.

Messrs. J. F. CARROTT and J. H. WILLIAMS, for appellant.

Mr. J. C. BROADY, for appellee.

CONGER J. This was a bill in chancery filed in the Circuit Court of Adams County by Sarah A. Kingsbury, administratrix of the estate of Albert B. Kingsbury, deceased, and against appellant, Alexander T. Miller, asking for a settlement of the partnership business theretofore existing between said Albert B. Kingsbury, deceased, and appellant Miller. The case was referred to a master, who took the evidence and made his report to the court. A large number of exceptions were filed to the master's report, but by an agreement of the parties the court heard and determined the cause from the evidence regardless of the findings of the master, and the court rendered a decree against said appellant Miller for the sum of \$2,389.88. Upon an appeal being taken from that decree to this court it was reversed and the cause remanded at the November term, 1888, of this court.

It appears from the record that when the cause was again

tried in the Circuit Court no reference to the master was made, but the court took up and passed upon the exceptions formerly filed to the master's report, being in all twenty-three exceptions, sustaining five, overruling ten, and sustaining in part and overruling in part the remaining eight, and entered a decree against appellant for the sum of \$2,387.88, being \$2 less than the former decree.

We are met by the same difficulty in the record as presented now, that existed when the case was here before. The final decree of the court makes no statement of the basis or theory upon which it proceeded in fixing the amount due from appellant at the sum of \$2,387.88, and when we refer to the holding of the court in passing upon the exceptions to the master's report, we can not, in many instances, determine what the holding of the court was intended to be. The first exception was: "The master found that Miller was entitled to but \$25 per month for his services, whereas he should have found that Miller was entitled to \$40 per month." The finding of the court is that this exception "be overruled," thereby impliedly holding that appellant was entitled to \$25 per month for his services to the firm.

The master had found upon this subject that Miller had been paid by Kingsbury during his lifetime for all services rendered to the firm, but whether the court upheld this finding of the master we are unable to determine from the record; and so with other rulings of the court in which exceptions are in part overruled and in part sustained, but without that definiteness that enables us to know clearly the views of the court. It is insisted by counsel that the decree is based upon the ruling of the court upon the first exception to the master's supplemental report, by which the court holds that appellant should be charged with one-half of \$5,400.64 furnished the firm by Kingsbury, less one-half the amount Kingsbury received in excess of his one-half from Kreitz for sale of ice, and that the court ignored all other claims on both sides. While this is probable, judging from the amount of the decree, there is nothing in the record other than that to verify it.

It appears from the evidence that there are firm assets left undisposed of in the hands of appellant, as well as judgments against him for firm debts. No reference is made to either in the decree, nor any provision whatever for a final adjustment of the firm matters. Counsel for appellee, in reference to this matter, in his brief says:

"In respect to the two judgments against Miller, mentioned on page 14 of appellant's argument, I will say both of these judgments do not amount to as much as the balance in cash in appellant's hands, as surviving partner, November 20, 1886, as shown by his report of that date filed in the Adams County Court, said balance being \$3,777.59, and the total amount of these judgments being \$2,633.76. It was appellant's fault that the judgments were allowed to be obtained. In matter of fact, the largest of the judgments—I mean the one for \$2,361.65, in favor of First National Bank of Quincy—or a large part of it, at least, has been paid by Miller out of said balance, and I think the other one of said judgments has also been paid in like manner, but whether or not this is evidence I can not say, and for the purposes of the case, as it now stands, I regard it as wholly immaterial; for if he has not paid them, it appears from the evidence he has in his hands, as surviving partner, ample moneys with which to pay them."

We do not wish to be understood as expressing any opinion upon the rights of appellant as to these judgments, but think *the whole* partnership should be determined by this decree so *that* it will be a final adjudication of all matters growing out *the* partnership, at least so far as they can be, up to the *time* of rendering the decree. The present decree, it would *be* seem, proceeds upon the theory of ascertaining the balance *due* from one partner to the other, upon the basis alone of con- *sidering* sidering what each paid into the common fund, and have indi- *vidually* vidually for their own personal use drawn out. If debts exist *against* against the firm, who shall pay them? If appellant has firm assets under his control, what shall he do with them? We do not think it any answer to say the County Court will deter- mine these matters upon the report of appellant as surviving partner. If this bill had not been filed, the County Court

would doubtless have adjusted these matters in accordance with the principles of justice.

The bill charges, among other things, that the estate of Kingsbury is in danger of losing the amount due it from appellant, and in danger of having large sums to pay on the indebtedness of the firm, if all of the firm assets are not applied in satisfaction of the same; prays for an injunction and a receiver; that an account be taken of the transactions of the firm; that its affairs be fully adjusted, etc. The decree should be final upon these questions, and not leave them to be litigated again as soon as this case is concluded.

The decree of the Circuit Court will be reversed, and the cause remanded with directions to refer the cause to the master to find upon the evidence upon each of these controverted points, so that the decree may, as far as possible, make a final disposition of all matters in dispute between the parties growing out of or connected with the partnership.

Reversed and remanded.

ROBERT WEIR ET AL.

v.

WILLIAM M. DUSTIN ET AL.

Attachment—Bond—Action on by Assignee of Firm of Attachment Debtor—Set-off of Judgment Obtained in the Attachment Suit.

1. Expenses incurred by the assignee of a co-partnership, of which a defendant in attachment was a member, in defending an attachment, can not be recovered, the same having been defeated in an action by such assignee upon the bond given by the attaching creditors in the attachment proceeding.

2. Were this otherwise, a personal judgment against the debtor, obtained in the attachment proceeding, could be set off in such an action by the assignee.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Logan County; the Hon. G. W. HEEDMAN, Judge, presiding.

Weir v. Dustin.

Mr. PARKE E. SIMMONS, for appellants.

Messrs. BLINN & HOBLITT and BEACH & HODNETT, for appellees.

WALL, J. Appellee recovered a judgment for \$611.86 against appellants in an action of debt on an attachment bond. The writ of attachment was issued at the instance of Weir & Craig against William M. Dustin and was levied upon real estate of said Dustin. That suit resulted in a judgment against Dustin for the amount claimed by Weir & Craig, but the attachment was defeated. A few days after the writ of attachment was levied, William M. Dustin & Co., a firm composed of said William M. Dustin and two other persons, made an assignment of all property, real and personal, choses in action, etc., belonging to said firm, to Aaron B. Nicholson, and a few days thereafter William M. Dustin conveyed the property levied upon to the said Nicholson, which conveyance was in the statutory form and contained the statement that it was intended thereby "to vest in said Aaron B. Nicholson, assignee, the same title in and to the said real estate that he has in the estate of said William M. Dustin & Co., for the sole use and benefit of their depositors."

The defense to the attachment was wholly and entirely the work of Nicholson, the assignee of Dustin & Co., and the items of damages for which the present suit was brought were all of them expenses incurred by said Nicholson as such assignee in said defense.

William M. Dustin was at no expense whatever in that behalf. He was unwilling or unable to make the defense, and really it does not appear that he had any particular interest in so doing. It was, however, a matter of interest to the creditors of Dustin & Co. to defeat the attachment, and the assignee made the defense on their behalf and used for that purpose the funds of the estate of William M. Dustin & Co.

The first question is whether expenses so incurred, not by the defendant in attachment, but by the assignee of a co-part-

nership of which he was a member, can be recovered in an action upon the bond given by the attaching creditor in that proceeding. That bond was in terms payable to the defendant William M. Dustin, and was conditioned to satisfy him for such cost and damages as should be awarded against them for the wrongful suing out of the said attachment. It was for his personal benefit and protection and to indemnify him for any loss or damage or expense he might sustain in that respect.

Had there been no assignment by his firm and had his partnership creditors made the defense for their own purposes, he being indifferent and permitting his name to be used but incurring no expense, it would never be supposed that in an action on the bond a recovery could be had for costs and expenses incurred by such creditors in that defense. It seems to be argued by counsel that by the assignment the assignee was invested with the legal right to make this defense and to recover the cost of it in the name of Dustin, as though it were a chose in action of the firm, which, by the assignment, passed to the assignee.

It did not belong to the firm but to Dustin only, and whatever it was, whether a chose in action or something less, or otherwise, it did not pass by the assignment; for according to the plain terms of that instrument it purported and professed to transfer only such rights as pertained to the firm and did not expressly or by implication include anything pertaining individually to William M. Dustin.

The liability of a surety is to be construed strictly, as we learn from the books, and it is fundamental that it is not to be extended beyond the reasonably plain purport of the language employed. The surety is supposed to sign the obligation with the understanding that it is to be so construed in his favor. This case illustrates the matter very well. It was not unlikely that as real estate only needed to be levied upon, and that there would be no damage thereto in any event, and as the only effect of the attachment would be to give the plaintiff therein an advantage over other creditors, the defendant would be indifferent as to the result; but it was not in contemplation that

Weir v. Dustin.

the creditors of Dustin & Co. might assume the defense and with a *carte blanche* as to expenses employ counsel *ad libitum* and bring witnesses from distant States as was done here, and recover it all back on this bond which was payable to William M. Dustin for his indemnity, when he had been at no loss whatever in the premises and had no real interest in the defense. The partnership creditors had no interest in this bond. It was not payable to them and they can not either directly or through the assignee obtain any relief upon it. As more or less supporting the view we take, reference may be had to Murfree on Official Bonds, Secs. 375-8; Wade on Attachment, Vol. 1, Sec. 107; Drake on Attachment, Sec. 162; Burgett v. Paxton, 15 Ill App. 379.

Counsel argue that by virtue of the statute regulating the giving of a bond in attachment cases any person interested in the proceedings may maintain an action on the bond; but we think the expression referred to relates to costs only and not to such damages as are here involved. We are of opinion that the Circuit Court erred in holding the appellants liable upon the facts stated for the expenses so incurred by the assignee in said defense.

It is also urged on behalf of appellants that even if the appellees could recover for these items on the bond, appellants might well set off the judgment held by Weir & Craig, the principals in the bond, against said William M. Dustin, which they proposed to do, but in which they were overruled by the Circuit Court. The present demand is nominally in behalf of William M. Dustin, and if the items thereof are recoverable in an action on this bond, it must be by reason of an assignment or transfer in fact, or by legal effect, of which the law will take notice, to Nicholson; but any such assignment must necessarily be subject to all equities existing at the time in favor of the bondsmen against Dustin, and it is well settled in this State at least, that in an action against a principal and his surety a demand in favor of the principal may be set off against the demand of the plaintiff against the principal and surety. Himrod v. Baugh, 85 Ill. 435.

It would hardly be doubted that under the rule announced

in the case just cited, if the present suit were in the name of Dustin alone (as in legal effect it really is, the name of the usee being immaterial and unnecessary), and his interests only were involved, the defendants might set off the judgment of Weir & Craig against him.

The subject-matter thereof was subsisting when the attachment bond was given and before any right of action thereon existed in favor of Dustin or any one else in his right. The case of *Harding v. Shephard*, 107 Ill. 264, is not in point, for in that case it was proposed to set off against a demand in favor of the executor for property by him sold to defendant, a claim held by the latter against the decedent.

We are inclined to hold that the proposed set-off was allowable and that it was error to deny it, assuming there was liability on the bond as claimed by appellees.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

THE CITY OF LITCHFIELD

v.

SILAS E. WARD.

Master and Servant—Minor—Municipal Corporations—Contract of Service—Recovery of Wages—Extra Help—Contradictory Instructions.

1. Although the principles announced in certain instructions are correct, as applied to a proper case, yet where they are not applicable to the case at bar, and are contradictory to other instructions given, and tend to confuse and mislead the jury, the giving of them constitutes reversible error.

2. In an action by a city employe to recover from the municipality compensation for assistance rendered him by his minor son, this court holds that the right of recovery depends upon the amount of steam power furnished a company named, in accordance with a resolution passed by the city council.

[Opinion filed February 14, 1890.]

APPEAL from the County Court of Montgomery County;
the Hon. AMOS MILLER, Judge, presiding.

Messrs. JOSEPH E. PADEN and JAMES H. TRUITT, for appellant.

Messrs. LANE & COOPER, for appellee.

CONGER, J. On the 1st day of March, 1888, appellee was employed by appellant, under a written contract, as the engineer of its water works, and by the terms of such contract he was to run the same for one year from that date for the sum of \$1,300, and to furnish all necessary assistance for that purpose. The same motive power of which appellee had charge, not only drove the water works, but also supplied the power to run the electric lights of the city. The amount of this power, which the city was required to furnish the Electric Light Company, was 100-horse power, and this was understood by appellee, for he says in his testimony, "I told Beeman that I was doing more work than was expected of me as engineer of the water works; I told him that we were furnishing more than 100-horse power to the Electric Light Company, that being the amount of power which the city was required to furnish the Electric Light Company.

About the 1st of December, 1888, additional machinery and dynamos for the Electric Light Company were put in, and appellee claimed that the power then furnished the Electric Light Company exceeded 100-horse power, and demanded from Mr. Beeman, who was chairman of the fire and water works committee, additional help. Appellee and Beeman contradict each other as to what Beeman did in the matter.

Appellee says Beeman promised to report the matter to the city council, and that Beeman told him the next morning after the council met, that he, appellee, could put his son at work to assist him, at fifteen cents per hour. Beeman says he promised to report the matter to the next council; that he was not present at such meeting, but afterward told appellee that the council had, as he understood, taken some kind of action at the meeting.

On the 6th of December, 1888, at a meeting then held of the city council, the records show the following proceedings.

"Alderman Thorp and Alderman Keithley stated that the engineer at the water works had asked for additional assistance."

"On motion of Alderman Neuber it was ordered that additional help be allowed him, with the understanding that the cost of such help be paid by the engineer, provided, that it shall be shown by a test, properly made, that the city is now furnishing to the Electric Light Company steam to the amount of more than 100-horse power; then, and in that case, the additional expense for such help shall be borne by the city."

Appellee employed his son, who was a minor, and proved that his labor, at fifteen cents an hour, was worth \$94.50, for which sum he obtained a verdict and judgment was rendered thereon.

On the 22d January, 1889, a test was made, in the presence of appellee and some of the aldermen of the city, which showed that the power which was then being furnished the Electric Light Company, was from eighty-one to eighty-six horse power. The court gave to the jury, among others, the following instructions for appellee.

I. "The court instructs the jury that when work and labor are performed for a party at his request and there is no agreement as to the amount to be paid, then there is in law an implied promise to pay what such work and labor is reasonably worth, and this applies to a corporation as well as an individual."

II. "The court instructs the jury that when one person labors for another with his knowledge and consent, and the latter voluntarily takes the benefit of such labor, then the law will presume that the laborer is to be paid for his labor unless the contrary is shown by the evidence; and if no special contract is provided fixing the price, then the laborer is entitled to have what his services are reasonably worth, and this rule applies to corporations as well as individuals."

And the following for appellant:

II. "The court instructs the jury that the resolution of the city council offered by the plaintiff, dated December 6, 1888, is the only employment of the plaintiff's son that can be con-

sidered in this case, and if the plaintiff went on and used his son in the work, knowing the test made, if you should believe that a test was properly made, showed less than 100-horse power, and made no objection to the city until after or about the time the employment of plaintiff had expired, then the jury will find in favor of the defendant."

These instructions are so directly contradictory that we can not well see how they failed to mislead and confuse the jury.

Appellant was insisting before the jury that they could not rely upon a supposed implied contract or understanding between the parties, but were governed by the resolution of December 6th, and by its second instruction had its view of the law of the case indorsed by the court. Appellee, on the contrary, was insisting that the resolution of the council was not the only evidence of the contract, but that one might be implied to pay a reasonable compensation for labor of which another voluntarily takes the benefit, and had his views given to the jury.

We are inclined to think appellant's second instruction was the law of the case, and those of appellee above quoted should not have been given. The principles announced in them are correct in a proper case, but they were not applicable to the facts of this case.

It is insisted by counsel for appellee in their brief that the resolution of December 6th was a ratification of the act of Mr. Beeman. Admitting, without deciding, that it would have that effect, it would seem to follow that the condition contained in such ratification would be a part of it, and must be met by appellee. But it is said the test could not be made; that it was a condition impossible to be performed, and therefore the resolution was an absolute ratification of the employment claimed to have been authorized by the aldermen. But the test was made, and so far as we are able to discover, by competent persons and with reasonably certain results.

Against this test appellee seeks to show that much more steam was generated in the boilers than would be required to run the water works and give to the Electric Light Company more than 100-horse power, and in their brief, counsel for

appellee say: "It was not the fault of the appellee that the engine of the Electric Light Company did not receive more than 100-horse power of steam. It was so set that it would not receive any more steam, and therefore the proviso of the resolution was impossible of performance; and for that reason can it be said that appellee shall not be paid for the labor rendered by his son, which is proven is beneficial? Clearly not. Such a rule would be unjust and oppressive in the extreme."

We fail to see that either party was at fault. The question to be determined was not how much steam was generated, but how much power was furnished the Electric Light Company; that is, what quantity of steam was actually employed in propelling the works of the Electric Light Company.

We do not think the case was properly presented to the jury, and the judgment of the County Court will be reversed and the cause remanded.

Reversed and remanded.

32 306
44 304

WILLIAM R. GRIFFITH

v.

M. L. WELSH ET AL.

Practice—Bill of Exceptions.

This court will not interfere with the judgment of the trial court where the bill of exceptions fails to show a motion for a new trial made, or exception to the judgment entered.

[Opinion filed February 14, 1890.]

APPEAL from the County Court of Clark County; the Hon. H. GASSAWAY, Judge, presiding.

Mr. S. S. WHITEHEAD, for appellant.

Mr. NEWTON TIBES, for appellees.

Butler v. McLean County.

Per Curiam. The judgment in this case must be affirmed because the bill of exceptions fails to show that a motion for a new trial, or exception to the judgment was made. The record of the judgment as certified by the clerk does so show, but this is not the proper mode. James v. Dexter, 113 Ill. 654; Dickett v. Durrell, 11 Ill. 72; Law v. Fletcher, 84 Ill. 45.

The judgment of the County Court will therefore be affirmed.

Judgment affirmed.

JAMES P. BUTLER
v.
COUNTY OF McLEAN.

Criminal Law—Rewards—Horse Thief—Powers of County Boards—Statutes.

Under Sec. 15, Chap. 60, R. S., county boards have power to offer the reward therein named for the capture of a thief, where the property stolen is a horse of less value than \$50.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

This was an action brought by appellant against appellee to recover a reward of \$100 each, for the capture of three horse thieves. A jury was waived and the case tried by the court.

Under the authority given by Sec. 15, Chap. 60, R. S., the board of supervisors of the county of McLean passed the following resolution:

“Whereas, at the March meeting of this board the reward for the capture of horse thieves was raised from \$50 to \$100; therefore, be it resolved that the resolution be so changed as

to read, the reward for the capture and conviction of any horse thief shall be \$100, one-half of which shall be left in the hands of the chairman of this board to defray expenses of capture if necessary."

Under the inducement offered by this section and resolution, appellant captured three horse thieves, viz: Pearl Mosier, Benjamin Moore and Silas Buckles. All three were afterward convicted of horse stealing. Each of the first two stole a horse worth more than \$50. The last one, Silas Buckles, stole a horse worth less than \$50.

The court below allowed appellant \$100 each, less amounts that had previously been allowed him by the appellee, for the first two, and refused to allow him anything for the capture and conviction of the last named horse thief on the ground that the horse stolen by him was worth less than \$50. To test this decision the appellant brings the case to this court.

Mr. A. E. DeMANGE, for appellant.

Messrs. E. H. MINOR and E. O'CONNELL, for appellee.

WALL, J. It is provided by Sec. 15, Chap. 60, R. S., that, "the county boards of the respective counties may offer rewards not exceeding \$1,000 each for the pursuit, arrest, detection or conviction of any person guilty of stealing any horse, mare, colt, mule, ass, or neat cattle, or any other property exceeding \$50 in value." And the question presented here is whether such reward can be offered where the property stolen is a horse not exceeding \$50 in value. It was held by the Circuit Court that this qualification of value is to be applied to each of the different animals named so that no reward can be based upon the larceny of any unless of the stated valuation.

We are unable to agree with this construction. It is general knowledge that very few colts or cattle are worth \$50. Yet such property is peculiarly exposed to theft, which is one—perhaps the controlling reason for affording it the special protection of this law. The larceny of a horse, mule or ass subjects the convicted offender to confinement in the penitentiary for the term of not less than three nor more

Butler v. McLean County.

than twenty years, regardless of value, while for other larcenies the term is less and it is necessary to aver and prove the special value of more than \$15.

The well known policy of our legislation on this subject might properly be called in aid when construing the present enactment; but it is not necessary. Considering the language employed, with the punctuation as given, it is very clear that the qualification was intended to apply, not to the property named specially, but to other property having less need of peculiar protection, wherefore it was deemed necessary to add this limitation, as to such other property. Reading, however, without regard to punctuation, we reach the same conclusion. It is a familiar rule that every part of a statute is to be treated as having force, meaning and import. It is not to be supposed that the legislature purposely inserted superfluous words in an enactment. Rather it is to be presumed that every word had a proper significance. Here we find six different classes of animals specially enumerated, and the words, "or any other property exceeding \$50 in value."

If the construction contended for by appellee is correct, nothing was accomplished by such enumeration and the section means no more than it would if these classes had been omitted and the section had merely provided that in case of the larceny of any property worth so much the reward might be offered.

This is a remedial or an enabling statute intended to afford additional protection to property and to repress felony. It should not receive a construction so narrow as to render useless and unmeaning a substantive portion thereof, consisting of terms evidently selected with care and in view of some definite object and purpose.

The construction should be liberal rather than strict. We think there is little need of extrinsic aid in construing the language and that the plain import is that the limitation of value does not apply to the different animals specially designated, but only to other property not enumerated.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

CITY OF BLOOMINGTON ET AL.

V.

WILLIAM P. BROPHY.

Real Property—Forcible Detainer—Title—Evidence—Entry by Owner—Possession by Another.

1. In a suit of forcible detainer, evidence as to title, introduced merely for the purpose of showing the character or extent of a possession, may properly be considered.

2. The owner of land, having a present right of immediate possession, may enter the same in a peaceable manner, though occupied by another, without becoming by reason of such entry a trespasser.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

Mr. A. E. DEMANGE, for appellants.

Messrs. KERRICK, LUCAS & SPENCER, for appellee.

CONGER, J. This was an action of forcible entry by appellee against appellant and its street commissioner, for entering upon a strip of ground forming a part of Seminary avenue in the City of Bloomington.

In 1855 William T. Major laid out Major's Seminary Addition to the City of Bloomington, and had it properly certified and recorded under the provisions of the statute of 1845. By the plat Seminary avenue was laid out sixty feet wide, from Center street to the C. & A. R. R.; Major owned all the land both on the north and south sides of Seminary avenue. He and his grantees sold the lots in Major's Seminary addition fronting north on Seminary avenue as platted, and they are now owned by third parties who have built dwellings and other improvements thereon. Until the year 1887, the land north of Seminary avenue was used as a pasture by Major

and his heirs, and an old board fence stood between it and a part of Seminary avenue. At Center street the fence stood south of a line fifty-five feet north of the south line of Seminary avenue and extended west in a direction a little north of west until, near the C. & A. R. R., it intersected a line sixty feet north of the south line of Seminary avenue as platted. In other words, at Center street the fence started south of the line claimed by plaintiff, then ran in a northwesterly direction till it crossed the line claimed by plaintiff, thence in the same direction till it intersected the sixty-foot line or true line of the street as platted. The city had located a street railway in Seminary avenue, with its center line on the center of the sixty-foot street as platted, and had erected electric light poles, and set water hydrants on the north side of the street, so that if five feet were taken off of the platted streets the poles and hydrants would stand in the sidewalk space on the north side, but not within the disputed five-foot strip. The water main and hydrants were laid and set in 1875, when one of the owners of the ground north of the old fence was mayor of the city.

In 1887 plaintiff, with others, purchased the pasture of Major's heirs and caused it to be platted into lots and streets and showing Seminary avenue by their plat to be only fifty-five feet wide. This plat was called Walnut Hill Addition. In some way the approval of the city council was secured for this plat and it was recorded with its certificates, thus attempting to take five feet of ground from the north side of Seminary avenue as platted in Major's Seminary Addition, part of which had always been outside of the old fence and in the street as actually used, and causing to appear upon the deed records a second plat of Seminary avenue showing it only fifty-five feet wide, while the other, which had been of record for more than thirty years, showed it sixty feet wide.

The city council shortly afterward, upon petition of property owners on the south side of Seminary avenue, investigated the matter and adopted a report locating the true lines of Seminary avenue as platted in Major's Seminary Addition, and directing its city engineer to see that no sidewalks were

laid except on such lines. The plaintiff, some six or eight months prior to defendant's entry, took down the old fence. Prior to the entry the city had passed an ordinance for a brick sidewalk on the north side of Seminary avenue, and under the authority of that ordinance the defendant Ives, as street commissioner, with the city engineer, located the north line of the street by measurements, set stakes and ran a line from stake to stake on the north line of the street, and peaceably, without force or violence of any kind, excavated, graded and laid a bed of cinders for the walk. Plaintiff then commenced this action; defendant pleaded the statutory plea of not guilty and introduced evidence of the city's fee simple title to the street, the same as if justifying under a plea of *liberum tenementum* in trespass. Defendant's evidence of title and of the location of the north line of Seminary avenue, as platted in Major's Seminary Addition, was undisputed, but the court below refused to consider it, and held that the city's peaceable entry upon its own ground, although without actual force or violence, was an unlawful entry and a forcible entry, "within the legal meaning of that term." The court's ruling upon that point, and the judgment for plaintiff based thereon, is the error complained of.

We have appended to this opinion the statement of facts as presented in the brief of counsel for appellant, which will make the questions of law arising upon the record sufficiently clear.

It clearly appears from the record that the old fence upon the northern line of Seminary avenue did not stand exactly upon the northern line of the street, as contended for by either of the parties. At Center street it stood in the street if but fifty-five feet wide, but in running west, it tended northward until it crossed the north line of the street if regarded as sixty feet wide, thus leaving a part of the ground which appellee obtained possession of in the court below, south of the fence and beyond any possession claimed by him or his grantors as adverse to the appellant. In thus holding we think the court below erred. But the real questions are: First, in a suit of forcible detainer, is it competent for the

court to inquire into the title? It needs no citation of authorities to show that this can not be done, when the title as such is the issue, and both parties rely upon conflicting titles for success. But when introduced merely for the purpose of showing the character or extent of a possession, evidence of title may be shown.

As we said in *Bloomington v. Graves*, 28 Ill. App. 619, "Where the land is entirely vacant at the time of the alleged trespass or forcible entry, either party may introduce his title papers, because in such case title draws to it a constructive possession; and so, also, where it is actually occupied in part, the party so occupying may introduce them, because they fix by conclusive presumption the extent of his actual possession, which in either case is sufficient for all the purposes of this action."

In the present case it was proper to investigate the title of the city to the strip of five feet on the northern side of Seminary avenue to determine whether it had such constructive possession by virtue of its ownership as would draw to it the right of entry. Had appellee, however, set up and relied upon a conflicting title, the examination and decision of such a question would not have been proper in this form of action. He did not do this, but relied upon the fact that the city had never been in the actual possession of such strip, and this presents the second question, which is:

Can the owner of land, having a present right of immediate possession, enter the same in a peaceable manner, though occupied by another, without becoming, by reason of such entry, a trespasser? The Supreme Court in the cases of *Dearborn Lodge v. Klein*, 115 Ill. 177 and *Lee v. Town of Mound Station*, 118 Ill. 316, have clearly answered this question in the affirmative. The prior decisions of that court upon this subject are reviewed, and the law is so clearly laid down that no doubt could be entertained as to the law of this State upon the subject were it not for certain expressions used by the court in the late case of *Gage v. Hampton*, 127 Ill. 87, which would seem difficult to reconcile with the former decisions, although it is said in the latter case that the Dear-

born Lodge case has no bearing on that, and we therefore proceed upon the theory that the two former cases were not intended to be overruled or modified, and shall rest our conclusions upon them.

Upon the authority of these cases, we think the city, having the title to this strip of five feet, had a right to enter upon and take possession of it, provided it did so without force, and in a peaceable manner, and that the word "force" as here used means actual force, as contradistinguished from implied force, and that after Seminary avenue had been dedicated to the public to the width of sixty feet, any possession of such street or any part of it by appellee or his grantors, as against the public, "must have been in subordination to its rights. If lawful, it must have been in trust for the public, and to enable those representing the public to appropriate it to its distinct use at any moment they deemed advisable." *Lee v. Town of Mound Station, supra.*

It follows, we think, if we are not mistaken as to the holding of the Supreme Court, that the Circuit Court proceeded upon an erroneous view of the law, and its judgment will therefore be reversed and the cause remanded.

Reversed and remanded.

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60	181

LEMUEL J. ANDERSON

v.

WALKER DONALDSON.

Sales—Hogs—Disease—Express Warranty—Breach—Instructions—Damages—Burden of Proof.

1. From the evidence adduced, this court holds that defendant gave a warranty to plaintiff at the time of the sale in question.

2. In the case presented this court holds that although an instruction given for the plaintiff was defective, in that it left it to be inferred that a mere statement by the defendant that certain hogs were sound, regardless of the time at which it was made, or its object, would, if relied upon by the plaintiff, constitute a warranty, yet, as the evidence disclosed no such declarations except at the time of the sale, and other instructions were clear and positive to the effect that the statements should have been made for the

Anderson v. Donaldson.

purpose of assuring the buyer of the truth of the facts affirmed and thereby inducing a sale, such errors did no harm.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Menard County; the Hon. L. LACEY, Judge, presiding.

Messrs. BEACH & HODNETT, for appellant.

Messrs. T. W. McNEELY and N. W. BRANSON, for appellee.

WALL, J. Appellee recovered a judgment against appellant for \$247.80 in an action on the case.

The declaration contained seven counts, all of which except the last were based upon an alleged breach of warranty in the sale of hogs. The last count was for fraudulently concealing the diseased condition of the hogs, and averred that the plaintiff, being unaware of their said condition, turned them in with other hogs of his, whereby the latter became infected, etc.

The evidence in the case is quite voluminous and not harmonious. The argument of appellant is mainly devoted to a discussion of the question whether there was a warranty and a breach thereof, as there seems to be nothing to support the charge of deceit alleged in the last count. We are not impressed with the belief that the verdict is contrary to the evidence. The appellant undoubtedly used expressions to the appellee personally and to the crowd in general which might well imply a warranty, and it is not unreasonable to regard him as intending to be so understood. It is altogether probable the hogs were then infected, and it is certain the appellee sustained damages in consequence to the amount of the verdict. We should not feel at liberty to set aside the conclusion of the jury upon such a question of fact, in regard to which they were especially fitted to decide between the parties. There is, no doubt, considerable conflict in the evidence, but there is nothing so remarkable in this respect as to require our interference.

The fourth instruction given for plaintiff was defective, in that it left it to be inferred that a mere statement by the

defendant that the hogs were sound and all right, regardless of the time it was made or its object, would, if relied upon by the plaintiff, constitute a warranty. As to the time the statement was made, the evidence disclosed no such declarations except those on the occasion of the sale. Hence the looseness of the instruction in this respect did no harm. As to the necessity that the statement should have been made for the purpose of assuring the buyer of the truth of the facts affirmed, and thereby inducing the sale, other instructions given, as well for plaintiff as defendant, were clear and positive. It was distinctly announced in the plaintiff's third and fifth, and in the defendant's fifth, eighth, ninth, tenth, eleventh and twelfth; while in the first, second and third for defendant the jury were plainly told that nothing less than an express warranty would suffice. When the two sets of instructions are all considered it is hardly possible—certainly not probable—that the jury were misled on this point. We can not properly reverse the judgment for this defect when we are so well justified in the view that it did not improperly affect the verdict. *Willard v. Swansen*, 126 Ill. 381.

It is urged the seventh instruction for the plaintiff gave the jury "the utmost latitude as to the amount of the verdict." The amount was, by the instruction, to be found from the evidence not to exceed the *ad damnum*, and it is apparent from the result that the reference to the amount claimed in the declaration had no effect upon the jury. It is also urged that by the modification of several instructions asked by the defendant the burden of proof was improperly shifted from plaintiff to defendant as to one of the necessary elements of a warranty. We think the criticism unsound, and that no error was committed in that respect.

No other points are urged in the printed argument. The main question in the case was whether there was a warranty. That was for the jury, and the controversy was one that a jury was peculiarly qualified to determine.

We think no error of law appears of such character as to warrant us in setting aside the judgment, and the same must therefore be affirmed.

Judgment affirmed.

Rohn v. City of Beardstown.

ADDIE ROHN
v.
CITY OF BEARDSTOWN.

Ferries—Regulation of Rates—Reservation to City—Exercise of Right Must be Reasonable.

1. A private statute granting a ferry privilege, and containing the provision that a certain city shall have the right to regulate and control the rates of toll, implies that such regulation shall be reasonable.

2. In the case presented this court holds that, in view of the evidence, the judgment of the court below, upholding as reasonable the rates established by the city, which are herein complained of, should not be disturbed.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Cass County; the Hon. LYMAN LACEY, Judge, presiding.

Messrs. MORRISON & WHITLOCK, for appellant.

In the case at bar the ferry owners accepted the charter under the provision that the city should determine the rates of ferriage. But that would only mean such rates as were reasonable. The enforcement of this ordinance would destroy the business of appellant. Hence the ordinance is in restraint of trade, and therefore invalid. *T., W. & W. R. R. Co. v. Jacksonville*, 67 Ill. 37; *Chicago v. Rumpff*, 45 Ill. 90; *Caldwell v. Alton*, 33 Ill. 416; *C., C. I. & P. R. R. Co. v. Joliet*, 79 Ill. 44; *Bloomington v. Wahl*, 46 Ill. 489; *Gridley v. Bloomington*, 88 Ill. 554; see, also, *Clinton v. Phillips*, 58 Ill. 102; *Trustees v. People*, 87 Ill. 303; *Ruleson v. Post*, 79 Ill. 567; 1 *Dillon on Municipal Corp.*, Sec. 319, p. 331, 3d Ed.; *Robinson v. Mayor, etc.*, 1 *Humph.* 156, reported in 34 *Am Dec.* 625, with copious notes on page 633.

Messrs. B. F. THACKER and A. A. LEEPER, for appellee.

WALL, J. The General Assembly passed an act which was approved February 26, 1867, granting to Luther A. Jones and

Seth Thompson a ferry franchise on the Illinois river, at Beardstown, for the term of twenty-five years.

The privilege so conferred was subject to the payment of \$200 per annum for a license to the city of Beardstown, and to the provision that the said city should "have the right to regulate and control the rates of toll for crossing the said ferry."

On the 6th of August, 1889, the city for the first time, so far as disclosed by the record, assumed to exercise the power to fix the rates, and passed an ordinance making them much lower than had previously been charged, and imposed a fine for non-compliance therewith.

Appellant, who claims to own the franchise by purchase from the original grantees, and who was operating the ferry when said ordinance was adopted, was sued by the city for charging in excess of the ordinance rates. The cause was tried by the court by consent, and there was judgment for the city, the propriety of which is now presented by the errors assigned.

The only question is whether said ordinance is a valid exercise of the power conferred by said act.

It is suggested on behalf of the city that the power reserved in the act to the city to fix the rates is without limitation, and rests upon the same ground as though it had been reserved to the legislature. We are of opinion that the city was vested with all the power which would have remained in the State had the reservation been generally to the legislature to fix said rates, and the inquiry would then be whether they might have been placed at any figure, or whether the limitation or condition that they should be reasonable was implied.

The object of granting the franchise was to benefit, not only the grantee, but the public, and it is not to be presumed that such a grant would have been desired if coupled with the condition that the property employed and the money invested might at any time be rendered worthless by a ruinous reduction of the rates, and where such power of control is reserved it is fairly implied that it should be exercised reasonably, otherwise not only the grantee but the public would suffer.

If this be not so the most unjust and unfortunate consequences might result, and we are not disposed to assume that the legislature so intended.

While the letter of the provision is that the city may "regulate and control the rates," the spirit thereof requires that such regulation and control must be so exercised as to preserve and not destroy the subject-matter, and by placing proper limits and restrictions upon the rates, carry out and accomplish the general purpose which led the legislature to confer the privilege, thus securing to the public the valuable and necessary service which the ferry would be able to render at rates that would be reasonable and fairly remunerative to the owner of the franchise. So the inquiry is narrowed down to the mere question of fact, were the rates fixed unreasonably low?

Perhaps it is more accurate to regard this as a mixed question of law and fact, for it to some extent involves both. What items should be considered as a proper basis of the calculation?

What are the necessary fixed charges? First, all necessary expenses; second, interest on the investment.

In the first item should be counted not only current and useful expenses but some per centum for annual repairs and depreciation in value, and in the second it would be important to know not merely what had been the cost of the outfit—the plant—but what it should be or should have been by good management and careful construction.

An unreasonably expensive supply of boats or other appliances, constructed and provided regardless of cost, ought not to furnish in whole or in part the basis for an interest charge. We do not find in this record such information on this point, as to the cost or real value of the property, as would be useful in forming a correct estimate in regard thereto. There is also a want of accurate and certain evidence in reference to the receipts and current expenses. It is probable that an increased and growing traffic induced by low rates will compensate partially if not wholly for the reduction, but this can not well be known until more time has elapsed. The

ordinance had been in force but a brief period before the trial, and the testimony as to what the result had been, as well as the opinions of witnesses as to what it would be, was far from convincing on either side. The presumption is that the rates fixed by the ordinance are fair and reasonable, and the burden is upon appellant to show the contrary. All considered we are not prepared to say that the finding of the court is so manifestly against the rights of appellant as to require our interference. The judgment will be affirmed.

Judgment affirmed.

THOMAS J. BUNN ET AL.

V.

THE PEOPLE, FOR USE, ETC.

Principal and Surety—Debt—Board of Education—Treasurer of—Commissions—Voluntary Relinquishment of.

Where a treasurer of a board of education has voluntarily paid to his successor in office the amount of money in his hands, including the amount he might be entitled to hold as commissions, under the statute, he can not subsequently, having been again elected to the office, retain from his then successor, the commissions on the funds handled by him during the first period for which he held the office. He can only retain the commissions out of the funds of the current year.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of McLean County; the Hon. A. SAMPLE, Judge, presiding.

MESSRS. STEVENSON & EWING and HAMILTON SPENCER, for appellants.

1. The appointment of an individual to an office for which a compensation is fixed by law is a contract to pay the officer such compensation, which the appointing power has no right or power to change. Patton's Case, 7 Court Cl. 371; Adams

v. U. S., 20 Court Cl. 115; U. S. v. Williamson, 23 Wall. 411; Dartmouth Coll. v. Woodward, 4 Wheat. 518, 694; Davis v. Gray, 16 Wall. 203-232; Bostarek v. Wisconsin, 103 U. S. 5.

2. Even where an officer, upon receipt of part of his legal compensation, gives a receipt in full, he is not thereby estopped from claiming, nor does he waive his right to claim and collect the residue. Montague v. Massey, 76 Va. 307; Neal v. Allen, lb. 437; Adams v. U. S., 20 Court Cl. 115; Fisher v. U. S., 15 Court Cl. 323-330; Mitchell v. U. S., 18 Court Cl. 281; Dyer v. U. S., 20 Court Cl. 166; Baldwin v. U. S., 15 Court Cl. 297; People v. Board of Police, 75 N. Y. 38; Kehn v. State, 93 N. Y. 291; State v. Steele, 59 Texas, 200; State v. Cooke, 57 Texas, 205; U. S. v. Langton, 118 U. S. 389.

3. Even a positive contract made by an officer that he will not claim part or all of the compensation fixed by law is void, as being against public policy, and does not prevent him from claiming all such compensation. Much less does mere silence, or omission to make such claim, bar him. People v. Board of Police, 75 N. Y. 38; State v. Mayor of Nashville, 15 Lea, 697; Settle v. Sterling, 1 Idaho, 259 (cited in 13 U. S. Dig. N. S., 691, Sec. 35); Liverpool Corp. v. Wright, 1 John. (V. C. Rep.) 354, cited in Jacob Fisher's Dig., Vol. VI, 9559; State v. Purdy, 36 Wis. 213; Alvord v. Collin, 20 Peck, 418; State v. Collier, 72 Mo. 13; Tucker v. Aiken, 6 N. H. 140; Carruthers v. Russell, 53 Iowa, 346; Bac. Ab., "Offices and Officers," F, 299; Waterbury v. Lawton, 57 Conn. 173.

4. The doctrine of waiver or estoppel has no place as regards the compensation of public officers. People v. Board of Police, 75 N. Y. 38; Goldsborough v. U. S., Taney, C. C. R. 80; Montague v. Massey, 76 Va. 307.

5. There can be no estoppel *in pais* where positive contract could not produce the same result; nor can there be in any case without an element of fraud. Mueller v. Kassman, 84 Mo. 318; People v. Brown, 67 Ill. 435.

6. Silence without knowledge works no estoppel. Even knowledge on the part of Bunn that no compensation was intended, and that no appropriation by the board of educa-

tion was made, would not in any way affect his rights. *Hill v. Epley*, 31 Pa. Stat. 334; *Boggs v. Mining Co.*, 14 Cal. 368; *State v. Mayor of Nashville*, 15 Lea, 697.

Messrs. I. N. PHILLIPS and KERRICK, LUCAS & SPENCER, for appellees.

The two per centum of each year's revenue could only have been deducted from the revenues of that particular year; the statute does not contemplate the confusing of the revenues of different years, thus making the taxpayers of one year assume the burdens belonging to taxpayers of former years. *Denby v. Moore*, 1 Barn. & Ald. 123.

The yearly settlements of Bunn with the board have the quality and force of accounts stated, and can not be opened up except by showing fraud, accident, imposition, or mistake of fact, and then only in equity. *Bankhead v. Alloway*, 6 Gold. 75; *McDoe v. Brown*, 2 Rich. (S. C.) 95 (1870 and 1871).

And this doctrine has been applied to accounts of an official nature, as between county treasurer and county board, town treasurer and town board, and to accounts of guardians, administrators, etc. *Sexton v. Richland Co.*, 27 Wis. 349; *Milwaukee Co. v. Hackett*, 21 Wis. 613; *Jefferson Co. v. Jones*, 19 Wis. 51; *Middletown v. Miles*, 61 Pa. St. 290; *Porter v. Cain*, 2 McMullin Eq. (S. C.) 84; *Murrel v. Murrel*, 2 Strob. Eq. (S. C.) 148; *Harding v. County of Montgomery*, 55 Iowa, 41; *Thomas v. Board of Supervisors*, 45 Mich. 479; *Cox v. City of New York*, 9 N. E. Rep. 48; *Supervisors, etc., v. Birdsall*, 4 Wend. 455; *The Commissioners of Scioto v. Gherky, Wright (Ohio)*, 493; *Gilchrist v. Brooklyn Grocers, etc.*, 66 Barb. 401; *Bruen v. Hone*, 2 Barb. 586; *Skying v. Greenwood*, 4 Barn. & Cress. 282 (side); *Cave v. Mills*, 7 Hurl. & Norm. 913; *Shaw v. Picton*, 4 Barn. & Cress. 715 (side).

An agreement by a treasurer, made before his appointment, that he will charge less compensation than the statute allows him, is so far binding upon such treasurer that he can not, after settling his accounts in accordance with the agreement, recover the additional fees allowed by statute. *Hobbs v. City of Yonkers*, 32 Hun, 454.

CONGER, J. This was an action of debt on the official bond of appellant as treasurer of the board of education of the city of Bloomington, and resulted in a judgment against appellant and his sureties for \$14,687.28.

Appellant had acted as treasurer of such board of education from June 5, 1877, to the spring of 1886, having been elected from year to year during that period. He was again elected as such treasurer in the spring of 1887, and remained such until May, 1888, when his successor was elected, and on June 9, 1888, made a formal demand upon appellant for the balance claimed to be in his hands. Appellant replied in writing: "I refuse to pay over the sum of \$15,777.78 (the amount demanded) to the board of education until a settlement is made with said board for services rendered, claiming two per cent on all amounts passing through my hands as treasurer of said board."

Appellant never made any claim to his commission of two per cent until the spring of 1888, and as he testifies, did not know that he was entitled by the law to such compensation until that time. From year to year he made his reports showing balances in his hands without any charge for this two per cent, and when he went out of office the first time, in the spring of 1886, he paid over to his successor the entire amount in his hands with no deduction for commissions. He now claims the right to deduct from the taxes in his hands, raised during the last year of his being in office, an amount equal to two per cent on all the amounts passing through his hands as treasurer during the entire time he held the office. The Circuit Court rejected this claim, allowed him his two per cent commission for the last year during which he was in office, and rendered judgment against him for the balance in his hands.

A great many questions are raised and elaborately argued by counsel. Such as, that appellant was a member of the board of education which elected him treasurer; that he was for a portion of the time postmaster and hence could not legally hold the office of treasurer. We do not deem it important, however, to notice any of these.

We think the Circuit Court held correctly. All but the last year's commissions he had voluntarily paid in the spring of 1886 to his successor in office.

If he was ignorant of his right to retain his commission it was ignorance of the law, and not of fact, and from that he could not be relieved. Again the law says the treasurer "shall be permitted to retain two per centum," and this means, out of the current year; not that a treasurer may continue from year to year to pay out all the revenues in his hands, including his own commission, whether as a gratuity or from ignorance of his rights in the premises, and then, upon changing his mind, or becoming better informed as to his rights, break in on the revenue raised for the support of the public schools of the current year for back salary, or commissions. We find no error in the record, and the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

DAVID LOCKMAN, SR.

V.

THE COUNTY OF MORGAN.

Highways—Order of Board Establishing—County Not under Township Organization Law—Appeal—Entry of Order Nunc pro Tunc.

1. There is no provision authorizing an appeal from an order establishing a public road (not a cartway) in the present road law relating to counties not under the township organization law, and the only appeal that is provided for in such cases is from the assessment of damages and the judgment thereon.

2. Appeals depend wholly upon the statute and can be taken only where it provides for them.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Morgan County; the Hon. CYRUS EPLER, Judge, presiding.

Lockman v. County of Morgan.

Mr. OSCAR A. DELEUW, for appellant.

Messrs. BROWN & KIRBY, for appellee.

WALL, J. The county board of Morgan county, a county not under township organization, at its September term, 1886, entertained a petition to establish a public road, which petition was signed by more than thirty-five voters residing within five miles of the proposed road, and appointed persons to examine the route and report at the next term. The viewers presented their report at the December term following, favoring the road, and the board then ordered that the same should be opened when the damages were all paid, provided also that Bader, one of the petitioners, should file his bond with approved security, in the penal sum of \$2,000, to save the county from all costs and damages, which bond was afterward filed and accepted. By the neglect of the clerk of the board this order of the December term, 1886, was not entered of record.

At the December term, 1888, the same petitioner, Bader, applied to the board asking that the order be entered *nunc pro tunc*. The motion was resisted by David Lockman, Sr., but after a hearing of evidence and argument it was allowed, and the order was entered then as of December 23, 1886. Thereupon Lockman, as the record states, "came and insisted on an assessment of damages pursuant to the statute, made and provided, and made his motion for that purpose, which motion was overruled, and the said David Lockman prayed an appeal to the Circuit Court of Morgan County, from an order of the court directing the clerk to enter the order of December 23, 1886, *nunc pro tunc*, and from the order which is allowed," etc.

Having perfected his appeal and the matter having reached the Circuit Court, a motion to dismiss the appeal was entered on behalf of the county and was sustained by the court, from which judgment Lockman has prosecuted an appeal to this court, and we are required to determine whether said appeal from the county board to the Circuit Court was properly dismissed.

In the case of *Roosa v. Henderson County*, 59 Ill. 446, it was held that an appeal from the order of the county board opening a new road, and before the damages were assessed and the final order thereon was entered, was premature. At the time that case was decided the mode of proceeding was somewhat different from the present. Then the assessment of damages was made by commissioners, whose award was reported directly to the county board, and thereupon the board, if it deemed the damages reasonable, and that the opening of the road was called for by the public interest and justified by the county finances, would approve the award and order the money paid, from which decision an appeal was allowed. It was very clear that the appeal was not in order until the final determination, after the damages were assessed.

As the law now stands under the present constitution, the damages must be assessed by jury, and it is provided by Par. 171, Chap. 121, *Starr & Curtis' Ill. Stats.*, that the proper road officer shall apply to a justice of the peace, who shall choose a jury to be empowered to assess the damages, and upon the verdict of the jury the justice shall enter judgment; and it is further provided that either party may appeal from such assessment and the judgment thereon to the Circuit Court, and that it shall be competent for the county board (or the petitioner in case of a cartway) to abandon the road after final judgment on such appeal if the award of damages is considered too high.

By Par. 164 it is provided that in the case of a cartway certain proceedings shall be had and that an appeal may be granted to the Circuit Court from the order establishing such cartway. We have not been able to find any provision authorizing an appeal from the order establishing an ordinary public road (not a cartway) in the present road law relating to counties not under township organization, and the only appeal that seems to be provided for in such cases is from the assessment of damages and the judgment thereon.

By the last clause of Par. 163, it is provided that "no new road shall be considered located nor be opened until the cost of condemning the land for such road shall have been ascer-

tained as provided in Sec. 23 (Par. 171) of this act and paid," so that it is plain the matter is not final until then.

The petition in this case was not framed as the statute requires (Par. 164) in case of a cartway, but is in the form prescribed for the ordinary public highway. True, it specifies the width of the proposed road, thirty feet less than is provided for the main leading roads, but this is authorized by Par. 168; and while the width is less than required for the main roads, yet it is a public road in the ordinary sense of the term, as distinguished from a cartway.

We are not required to determine whether the provision for an appeal in case of a cartway found in Par. 164 will authorize the appeal before the final determination, after damages are assessed.

Holding this is not a cartway and finding no provision for appeal in case of the ordinary public road except from the assessment of damages, we must necessarily hold with the Circuit Court that this appeal was properly dismissed because it was improperly allowed. Neither are we required to determine whether, as the law now stands, it would be proper, upon an appeal from the assessment of damages, to inquire into the regularity of the prior proceedings, as might have been done under the statute in force when *Roosa v. Henderson* Connty was decided.

There is a further objection to this appeal; that it is from a mere order, requiring the clerk to make an entry *nunc pro tunc*, and not from the original judgment. The order appealed from did not establish the road. It merely provided for placing in proper form an order which was made for that purpose (establishing the road) at the December term, 1886. The board was thus exercising an inherent power it certainly possessed to cause its record to show its proceedings in the original matter, by merely furnishing in due and regular entries the unquestionable evidence of its judgment. No new rights were thereby acquired—no new liabilities were imposed. All that was done or could be done then was to make the record, as it should have been made at the time. People, etc., *ex rel. v. Quick*, 92 Ill. 580.

Appellant urges that on the occasion of making this order *nunc pro tunc* he sought to have his damages assessed, and that the board, in failing to take action upon this motion, did something from which he could appeal. The record, which we copy *verbatim* above, seems to show that this appeal was limited to the matter of granting the order *nunc pro tunc*, but assuming that it would bring up all that was then done or omitted, we are unable to perceive that any ground for complaint was thereby presented. The board could not assess his damages at any time and they were not assuming to do anything beyond the mere entry of the order, as it should have been, at the December term, 1886. But this point, whatever it may involve, must be ruled against appellant if there is no provision for the appeal, as we hold. Appeals depend wholly upon the statute, and can exist only where it provides for them. The judgment is affirmed.

Judgment affirmed.

THE CHICAGO & ALTON RAILROAD COMPANY

V.

JULIUS J. ELMORE.

Railroads—Injury to Stock—Burning Grass—Instructions—Technical Objections—Failure of Jury to Specify under Which Count Verdict Was Rendered—Practice.

1. Where the evidence upon a question of fact is conflicting the verdict of the jury thereon will not be disturbed.
2. Assignments of error not called to the attention of the court below upon the motion for a new trial but first raised here, can not be considered.
3. Technical objections to instructions will not be considered by this court where it appears that the jury could not reasonably have been misled.
4. It is not error for the jury to fail to find and return in their verdict under what count of the declaration they find a defendant guilty.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Morgan County; the
HON. C. EPLER, Judge, presiding.

Messrs. BROWN & KIRBY, for appellant.

A railroad company is not required to keep such a guard on its fence or gate as to know the instant a breach occurs and repair at the time. C. & N. W. R. R. Co. v. Harris, 54 Ill. 528-531; Ill. Central R. R. Co. v. Dickerson, 27 Ill. 55; C. & N. R. R. Co. v. Barrie, 55 Ill. 226.

The evidence above cited shows that, if there was any defect in the fastening, it was not patent or discernible except upon a close examination, and that neither those using it and specially interested in its condition, nor any officer or agent of the company, had any knowledge or notice of any defect at the time of the accident.

Where a railroad fence, apparently good, is defective, the company must have notice of the defect before it can be held liable for any injury to stock. C., B. & Q. R. R. Co. v. Seirer, 60 Ill. 295; Ind. & St. L. R. R. Co. v. Hall, 88 Ill. 368.

A railroad company will not be liable for the temporary insufficient condition of its fence unless it has notice thereof and thereafter has neglected to repair. C. & A. R. R. Co. v. Umphenour, 69 Ill. 198.

No lapse of time is of itself conclusive that the railroad company knew or ought to have known of the defect in the fence. Each case depends upon its own circumstances. The company is bound to repair only within a reasonable time after the defect becomes apparent, all the circumstances being taken into account. Cleveland, etc., R. R. Co. v. Brown, 45 Ind. 91; Perry v. Dubuque, etc., R. R. Co., 36 Iowa, 102.

And a very different rule as to diligence should be applied where the defect is a broken hinge or a bent fastening or hook, from that which would be applicable where a fence is thrown down or a wide breach made therein.

While it is the duty of a railroad company to use diligence in noting and repairing defects or breaches that may occur in its fences, it is also the duty of the adjacent owner to be vigilant and give notice to the company if any defects are found. C., B. & Q. R. R. Co. v. Seirer, 60 Ill. 295; Poler v. N. Y. Cent. R. R. Co., 16 N. Y. 476-481.

We think the principles above laid down, when applied to the evidence offered by appellee alone, distinctly show that he has no right to recover under the first count of his declaration.

Messrs. MORRISON & WHITLOCK, for appellee.

CONGER, J. The appellee, Julius J. Elmore, is the owner of a farm on which he resides, situated in the northeastern part of Morgan county, Illinois. The railroad of the appellant runs through this farm. During the night of August 1, 1888, two horses belonging to appellee got upon the railroad track of appellant and were killed by the trains of appellant. These horses went upon the track through a gate leading from the pasture of appellee to a farm crossing over the railroad. On the 7th of February, 1889, an acre or two of grass was burned upon a pasture of appellee adjoining the right of way of appellant, by means of a fire originating upon the right of way. Appellee brought this action to recover from appellant damages alleged to have been sustained by him in the killing of said horses and the burning of the grass upon his pasture.

The declaration of appellee contains two counts. In the first count of his declaration, as amended, appellee charges that "it was the duty of said defendant to construct and maintain at farm crossings, gates or bars sufficient to prevent horses from getting on its railroad track, but that said defendant did not construct gates or bars at the farm crossings over its said road and thereafter maintain the same sufficient to prevent horses from getting on its said railroad, but neglected so to do, by means whereof two horses of the plaintiff, by reason of said gate not being constructed or maintained as aforesaid, on or about the 1st day of August, 1888, strayed from the pasture of the plaintiff in said county of Morgan contiguous to said defective gate onto the track of said railroad," and were there struck and killed by the train of appellant.

In the second count of his declaration, appellee charges that it was the duty of appellant to keep its right of way free from dead grass, etc., etc.; that appellant failed to do so, by

means whereof fire was communicated from a passing engine to such dry grass, etc., which was communicated to grass in a pasture of appellee, contiguous to said right of way, etc. This suit was instituted at the May term, 1889, of the Circuit Court of Morgan County, tried before a jury, who found a verdict for the plaintiff, assessing his damages at \$396. A motion made by appellee to set aside the verdict and grant a new trial was overruled and judgment rendered on the verdict against the appellant, who brings this appeal to reverse said judgment.

The defect in the gate complained of, was an alleged defective fastening. The one used was called a "standard fastening," and consisted of a chain from nine to twelve inches in length fastened to the gate by a staple, and a hook driven into the gate post. The gate was fastened by slipping a link of the chain over the hook. This hook was constructed with a stem about four inches in length, that was driven into the post by means of a shoulder under the curved part. This curved part, or hook, was intended to stand up two, or two and one-half inches perpendicular to the stem, when driven into the post. It was insisted by appellee that this hook pointed or leaned to the gate, instead of being perpendicular, so that any pressure on the gate would push the chain over the hook, and the gate would swing open. Appellants insist that the evidence was not such as to justify the jury in believing that this defect existed in the hook at the time the horses passed through the gate, and even if it was, it had not so existed for a sufficient length of time to hold the company responsible for the consequences that resulted. This was the principal controverted question of fact upon the trial, and after examining the testimony with care, we are not prepared to say that the jury were not authorized to find as they did upon it. The most that can be said is that the evidence upon this point is conflicting, and in such cases the verdict should not for that reason alone be disturbed.

The first assignment of error upon the record is: "The court erred in admitting incompetent testimony for the appellee over the objection of the appellant,"—and the second is: "The court erred in excluding competent evidence offered

by the appellant." As neither of these assignments of error were called to the attention of the court below in the motion for a new trial, and are for the first time raised in this court, they can not be considered.

The third assignment of error is that the court erred in giving to the jury improper instructions for the appellee. The objections pointed out are exceedingly technical. The first instruction was as follows:

"The court instructs the jury, for the plaintiff, that it is the duty of railroad companies in this State, six months after the road has been opened and operated, to construct and maintain at farm openings, gates or bars sufficient to keep cattle and horses from getting on said road, and in this case if you find from the evidence that said gate was constructed with insufficient fastenings, so that said gate was not held close thereby and prevented from swinging open when shut, then in law such gate would not be a compliance with the law; and if you find from the evidence that the said gate swung open by reason of such defective fastenings, and that thereby the horses of the plaintiff got on the track of the defendant and were thereby killed, then in law the defendant would be liable in this case for whatever sum the evidence may show to have been the value of said horses, together with a reasonable attorney's fee for suing for the same." The objection is to the use of the word "constructed." It is insisted that this word referred to the condition of the gate and its fastenings when originally made, or constructed, and not to the time the horses passed through it.

The second instruction is criticized because not modified by a statement that appellant had notice of such defect, or that it had existed for such length of time prior to the accident as to authorize a presumption of notice. It is as follows:

"The duty of railroad companies to build and maintain gates or bars at farm crossings is not complied with by building a gate with a defective fastening, and in this case if the evidence shows that the fastening of said gate was so defective that when shut it would, on pressure of wind against it or other ordinary forces, swing open, then in law such gate so

constructed would not be in compliance with the statutes of this State." The controversy before the jury was as to the condition of the gate and its fastening at the time of the accident. The attention of the jury was directed to that point, and not as to whether it had remained in a defective condition for any particular length of time. We think any reasonable jury would have understood both of these instructions as referring to the real condition of the gate and its fastening at the time of the accident, and, while they may be subject to verbal criticism, they could not have prejudiced the rights of appellant.

It is also urged there was error in the jury failing to find and return in their verdict under what count of the declaration they found appellant guilty. We do not think this point is well taken. If appellant desired the finding to be special as to any particular fact or facts, it could have submitted them under the statute; but nothing of the kind was attempted.

An instruction for appellant was given that the verdict might take the form of finding as to the first and second counts of the declaration, but they were not told it was obligatory upon them to do so, nor do we see how the jury could have been required to return what part of their verdict was based upon the value of the horses, and what upon the damages caused by the fire. If they had found against appellant upon one only of the counts, it is to be presumed they would have followed the suggestion of the court, and returned the form of verdict insisted upon by appellant; but not having done so, it is reasonable to suppose that the amount of the verdict is based in part upon both counts.

We see no good reason for disturbing the judgment of the Circuit Court, and it will therefore be affirmed.

Judgment affirmed.

JEROME MCGINNIS ET AL.

V.

THOMAS FERNANDES.

*Replevin—Corn in Shock—Ejectment—Judgment for Plaintiff in—
Lease during Pendency of Suit—Crops.*

A lessee of farm lands, the relation being entered into pending an appeal by his lessor from an adverse decision in an action of ejectment involving the land in question, can not hold the crops raised thereon, though severed from the soil, where the judgment in behalf of the plaintiff in such suit is affirmed in the higher court.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Sangamon County ; the
Hon. J. A. CREIGHTON, Judge, presiding.

Messrs. GROSS & BROADWELL and J. F. BARROW, for appellants.

Messrs. GREENE & HUMPHREY, for appellee.

WALL, J. The appellee recovered a judgment in an action of ejectment from which the defendant therein prosecuted an appeal to the Supreme Court, pending which appeal said defendant leased the land to the appellants in the present case. The appellants cultivated the land in corn, and the crops, being mature, were cut and shocked on the land. The judgment in ejectment was affirmed by the Supreme Court and a writ of possession was executed by the sheriff, and the land, with said corn in shocks, one thousand in number, being thereon, was delivered to the appellee.

The appellant brought replevin against the appellee for said shocks of corn, and the cause was submitted to the Circuit Court without a jury by consent. The finding and judgment of the court thereon was for the appellee, from which

an appeal was taken to this court. The question is, to whom did the corn belong? We think it was correctly answered by the Circuit Court. By the judgment in the ejectment case it was conclusively determined that the land was owned by the appellee and that the possession of the lessor of the appellants was unlawful, and so was their possession. They could acquire no rights by such an unlawful possession as against the appellee in anything they might produce on the land.

Various authorities are cited by appellants as to the effect of a severance of the products of the soil. Were the question between debtor and creditor, executor and heir, vendor and vendee, different considerations would be involved. It is not to be doubted that in this State the rule is that growing crops would pass by the writ of possession. It was so held in *Altes v. Hinckler*, 36 Ill. 275, where the court, in speaking of such crops, remark: "For some purposes and between some parties they are so (personal property), but between the successful plaintiff in an action of ejectment and the evicted defendant, they are unquestionably a part of the realty

We are unable to see how a severance, unlawfully produced, could change the situation and give legal value and efficiency to the result of the unlawful act. In *Simpkins v. Rogers*, 15 Ill. 397, it was held that the owner of land could maintain trover for crops grown upon his land without his permission, and in *Cratty v. Collins*, 13 Ill. 567, it was held that one who, without right, makes a crop upon the land of another, can not maintain trespass against the owner of the land for appropriating the crop to his own use. See, also, *Powell v. Rich*, 41 Ill. 466, where it was said: "As between landlord and tenant, debtor and creditor, and under our statute between the executor and heir, growing crops are personal property. But as between a trespasser and owner of the soil and a vendor and a vendee, they are realty." A tree, when growing upon the land, is realty; but when cut down and made into rails or posts or lumber, the character of personalty attaches to the product, and if the owner of the land were to sell it (the land), the rails or posts or lumber would not pass by the deed. *Cook v. Whiting*, 16 Ill. 480.

This is where the cutting down and manufacture is lawfully done—by the owner or by his consent. But if the tree were unlawfully cut down by a trespasser, and carried away after conversion into rails or boards, the right of the owner would in no wise be affected. He could pursue and recover as long as he could identify. The change in the character of the property, making personalty of what was realty, could not help the wrongdoer.

If one wrongfully in possession of timber land is sued in ejectment, and the owner is awarded the possession in such action, it should not affect injuriously the rights of the latter, that the timber had been by the former unlawfully converted into rails or staves. It would be a strange proposition that the wrongdoer in such case could rightfully claim the proceeds of his own tortious act, and thereby deprive the land owner of the timber, which was its most valuable part. In the present case, the Circuit Court had held, in the ejectment proceeding, that appellee was entitled to possession before appellants took their lease. They were, of course, bound to take notice of the facts, and, as the proof shows, they had actual knowledge thereof. The mere appeal did not affect the validity of the judgment, but only suspended its operation. *Curtis v. Root*, 28 Ill. 367; *Oakes v. Williams*, 107 Ill. 158. The land was then the property of appellee, and had been from the beginning of that suit. No change of title resulted from that judgment. It merely adjudged that the land was the plaintiff's, and therefore the defendant and those under him were unlawfully in possession.

It is unreasonable and illogical that on such facts the defendant or his lessors could, by any act of his or theirs, reap a profit from their unlawful occupancy. In *Adams on Ejectment*, 367, it is said: "When the sheriff declares the possession of the land under the writ of *habere facias possessionem*, he thereby also delivers possession of the crops upon it, and such crops will pass to the lessor, although severed at the time of the execution of the writ, provided such severance has been made subsequent to the determination of the tenant's interest, and of the day of the demise in the declaration.

And the growing crops will also pass to the lessor by the execution of the writ of possession, although previously seized under a *feri facias* against the tenant, if the day of demise be prior to the issuing of such *feri facias*, inasmuch as they can not be said to belong to the tenant, who is a trespasser from that day." The following citations sustain the same position: *McLain v. Boner*, 24 Wis. 295; *Kimball v. Lohmas*, 31 Cal. 154; *Rowell v. Klein*, 44 Ind. 290; *Am. and English Cy. of Law*, Vol. 6, 245.

The case of *Brothers v. Hurdle*, 10 Ire. 490, which maintains the opposite view, is pressed upon us. There are probably other cases to the same effect, but we are not persuaded of their correctness.

We are of opinion that upon the facts the judgment of the Circuit Court was right, and have not deemed it necessary to specially consider the legal propositions held at the instance of appellee.

In substance, however, they accord with the general views we have stated and are approved. The judgment will be affirmed.

Judgment affirmed.

PENN MUTUAL LIFE INSURANCE COMPANY

v.

ANNA C. KEACH.

85 427
74 146

Life Insurance—Action on Policy—Premium—Non-payment of—Forfeiture—Waiver—Course of Dealing—Parties—Special Interrogatories.

1. When the practice of an insurance company and its course of dealing have been such as to induce the belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted upon, the company will not be allowed to set up such forfeiture as against one in whom their conduct has induced such belief.

2. An insurance company may permit its agent to waive a forfeiture notwithstanding provisions in its policies that agents shall have no such authority.

3. In the case presented, this court holds that the evidence warranted the jury in the conclusion that the insured and the agent had an understanding binding upon both, in regard to a certain premium; that payment thereof was waived and postponed until a date which was later than the death of the assured, and that the acts of the agent were binding upon his company.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Greene County; the Hon. G. W. HERDMAN, Judge, presiding.

Messrs. JAMES R. WARD and H. H. C. MILLER, for appellant.

The provision for the release of an insurance company from liability on a failure to pay the premium when due, is of the very essence and substance of the contract of life insurance. *Klein v. Insurance Co.*, 104 U. S. 89; *Knickerbocker Life Ins. Co. v. Pemberton*, 112 U. S. 696.

The result of the non-payment of the premium at the time stipulated in this policy was to forfeit the policy, unless the plaintiff established by a preponderance of the evidence that the company had legally waived the payment as it became due. The company was not bound to formally declare a forfeiture upon the non-payment of the premium as required by the policy; it is sufficient to set up the forfeiture by way of defense when sued. *Catoir v. Am. Life Ins. & Trust Co.*, 33 N. J. 487; *North v. N. A. Life Ins. Co.*, 5 Court Rev. 93, U. S. C. C.; *North British Ins. Co. v. Steiger*, 124 Ill. 87-88; *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354.

Usage on the part of the insurance company, even if shown, of giving notice of the day of payment, and the reliance of the assured upon having such notice, is no cause for non-payment.

Usage of the insurers, not to demand punctual payment of a note, at the date of maturity, but to give days of grace, to-wit, "for thirty days thereafter," is not, when shown, a waiver of the clause of forfeiture. *Thompson v. Knickerbocker Life Ins. Co.*, 104 U. S. 252; *Morley v. New York Life Ins. Co.*, 2 Woods' U. S. Cir. Ct. R. 661; *Phelps v. I. C. R. R. Co.*, 63 Ill. 468.

Did the company waive the payment in cash, of the premium payable May 5, 1888, by the terms of the policy issued to John R. Keach, and postpone the payment thereof to a time beyond the date of his death? This allegation of the declaration implies an agreement or contract something more than acquiescence. Furthermore, the well established rule, as we have seen, is that the fact that the company may have previously indulged the assured by accepting his notes or payments of premiums which were long due, and by giving him notice when his premiums would fall due, furnished no excuse for his not meeting the other premiums promptly, in accordance with the terms of his policy, and such usage, if it existed, did not render it obligatory upon the company to continue to accept the notes of the assured or the premiums after they were long due, or to continue, in the absence of an express agreement, to give such notice. *Phelps v. I. C. R. R. Co.*, 63 Ill. 468; *Morley v. New York Life Ins. Co.*, 2 Woods' U. S. Cir. Ct. R. 661. *Thompson v. Insurance Co.*, 104 U. S. 257; *Insurance Co. v. Mowry*, 96 U. S. 544; *Schimp v. Cedar Rapids Ins. Co.*, 124 Ill. 354.

That the acceptance of notes for the quarterly premiums, accruing prior to May 5, 1888, upon the policies issued to John R. Keach and his wife, was a repetition of voluntary indulgences extended to Mr. and Mrs. Keach, at their request, by Mr. Hinman, solely upon his own responsibility and personal credit, and that Mr. and Mrs. Keach fully understood and participated in the transactions with that conviction, is clearly established by their own admissions contained in their letters given in evidence.

Mr. Hinman did not propose to "throw all payments over" to one time without knowing whether Mr. Keach was "likely" to obtain a loan, and when. His words are: "If you let me know, I will arrange," etc., but not without knowing. The proposition for postponement was qualified and conditional. The condition was not complied with. A contract, therefore, was not consummated; their minds never met unconditionally upon the two points that were most material to Mr. Hinman, to wit: Will you get a loan? If so, when? *Corcoran v.*

White, 117 Ill. 118; Maclay v. Harvey, 90 Ill. 525; Olney v. Howe, 89 Ill. 556; Davidson v. Porter, 57 Ill. 300; Esmay v. Groton, 18 Ill. 483; Smith v. Wetherell, 4 Ill. App. 655; Fox v. Turner, 1 Ill. App. 153.

Here all communication ceased. Mr. Hinman never answered Mr. Keach's inquiries and never sent the note for one year for signature, and they never wrote him to inquire the cause. The time from February 28, 1888, to July 27, 1888, when Mr. Keach died—five months—elapsed without receiving a word from Mr. Hinman, when previously letters had passed monthly and oftener. This was too great a lapse of silence for them to reasonably expect that their notes would be accepted, or for them to be induced to believe that their insurance was safe. They abandoned it—dropped it.

Messrs. HENRY C. WITHERS and PALMER & SHUTT, for appellee.

Keach was notified at the commencement that he was to deal with B. P. Hinman, general agent at Chicago, "whose name was stamped on the policy." And when Hinman, from time to time, forwarded notes for signature, and accepted notes instead of cash for premiums, and also disclosed to Keach that such notes, or some of them, had been forwarded to the home office of the company, Keach had the right to infer that Hinman had full authority to take such notes. Union Mutual Life Ins. Co. v. Slee, 110 Ill. 40.

The company having adopted this course of business, should have continued it or given reasonable notice to the contrary. The company, in accordance with the course of business so adopted, should have forwarded a note for the amount of premiums falling due May 5, 1888. If it had done so a note would have been given. It was the fault of the company that such note was not given. The company could not suddenly and without notice change its course of business and then claim a forfeiture as a result of its own misconduct and neglect. Com. Ins. Co. v. Spankneble, 52 Ill. 53; Atlantic Ins. Co. v. Wright, 22 Ill. 463.

"If the practice of the company and its course of dealing with the insured have been such as to induce a belief that so

much of the contract as provides for a forfeiture in a certain event will not be insisted upon, the company will not be allowed to set up such forfeiture as against one in whom their conduct has induced such belief." *Chicago Life Ins. Co. v. Warner*, 80 Ill. 413; *May on Insurance*, Sec. 361, *et seq.*

A custom or mode of business once begun must be continued or notice given of a change. Forfeitures are odious, and there must be no case of management or trickery to entrap a party into a forfeiture. *Insurance Co. v. Pottger*, 33 Ohio, 459.

In view of the company's dealings with him, Keach had reasonable cause to expect and rely upon a note being sent him for signature and the usual postponement of cash payment, and the company is estopped from setting up a forfeiture of the policy for the non-payment of cash May 5, 1888. *Insurance Co. v. Eggleston*, 96 U. S. 572; *Insurance Co. v. Norton*, 96 U. S. 234.

An insurance company may waive any condition of a policy inserted therein for its benefit, and evidence is admissible as to its practice in allowing its agents to extend the time of payment of premiums and premium notes, and the jury, upon such evidence, may find whether he was authorized to make the extension, and if so, whether the extension was, in fact, made. *Insurance Co. v. Norton*, 96 U. S. 234.

In case of *Phoenix Mut. Life Ins. Co. v. Doster et al.*, 106 U. S. Rep. 30, Mr. Justice Harlan has rendered a clear and able opinion approving the two cases above.

WALL, J. The appellee recovered a judgment against the appellant in an action of assumpsit upon a policy of insurance on the life of John R. Keach. The declaration sets out the policy, and is in the ordinary form except as to the following averments: "And the plaintiff avers that the said John R. Keach, during his lifetime, at all times complied on his part with all the covenants and conditions imposed upon him by the terms and provisions of said policy, and paid all premiums required to be paid by him except the premium of \$82.90, becoming due May 5, A. D. 1888; and the plaintiff avers that

the payment of said premium, in cash, on the 5th day of May, A. D. 1888, was waived by said company and postponed to a period of time beyond the date of the death of the said John R. Keach, and at the death of the said John R. Keach, the said policy was in full force."

The death of the assured occurred July 27, 1888, and unless the premium maturing May 5th of that year, which was not paid, was waived and postponed as above alleged, the company was not liable. The main and, indeed, the only important question was as to such waiver and postponement. The policy was dated November 5, 1885, for \$5,000, and was conditioned, *inter alia*, upon:

"The payment to the company, at its said home office, of the sum of \$82.90, at the date hereof, and of the quarter annual premium of \$82.90, at or before three o'clock P. M., on the 5th day of November, February, May and August, in every year during the continuance of this contract."

At the same time another policy was issued for the same amount, and, excepting as to the rate of premium, on similar terms, upon the life of appellee, Anna C. Keach (wife of said John R. Keach), the beneficiary in the policy in suit. There were stringent conditions as to the payment of the premiums *in cash* at the appointed times, and for forfeiture in a case of failure therein, and to the effect that no agent should have power on behalf of the company to make or modify that or any contract of insurance, or to extend the time of payment of a premium. The home office of the company was in Philadelphia, and its affairs in Illinois were under the management of its general agent, B. P. Hinman, whose office was in Chicago.

Although the premiums were payable in cash by the express terms of the policy, there never was a cash payment made. All were made by notes, drawn at different times, and for amounts covering the sums next maturing, with interest. These notes were payable to Hinman, and were by him indorsed either to a bank in Chicago or to the local bank of the insured at Carrollton. It was the habit of Hinman to send the notes to the assured for their signatures, and when

he received the notes so executed he would send them the "renewal receipts," so called, for the premiums. They evidently relied upon him to attend to this matter, and he was not only prompt but urgent in so doing. The notes were not all dated at the same time relatively as the receipts, but this was wholly controlled by him. It appears that while the assured had large landed interests from which, when crops were good, the income was very considerable, yet they were always pressed for ready money, and that but for his urgency and solicitation they would not have continued to carry their policies. The record contains a great many letters which passed between the parties, bearing strongly upon the facts already stated, but all need not be here quoted. On the 6th day of February, 1888, Hinman wrote as follows :

"J. R. KEACH, Esq.

"*Dear Sir*—Will you kindly see if Mr. Pierson does really pay the note, and let me know as soon as you can—by return mail, if possible. At the same time let me make a suggestion; suppose you make your premium payable annually; the rate is less, and I can accommodate you just as easily and with less frequent annoyance. See when you wish it payable and let me know. Mr. Pierson writes me that he thinks you will get your loan. Truly, etc.,

"B. P. HINMAN."

On the 28th of February, 1888, he again wrote :

"MR. AND MRS. J. R. AND A. C. KEACH.

"*My Dear Sir and Madam*—Would it not suit you better to pay but once a year? Is there not a time when money is likely to come in? If you let me know, I will arrange to throw all your payments over to that time. Write me. Truly, etc.,

"B. P. HINMAN."

To which was this reply :

"KEACH'S RANCH, ILL, March 6, 1888.

"B. P. HINMAN, Esq.

"*Dear Sir*—Your favor of the 28th ultimo, came to hand. Your kind offer would suit us very much better than the

present mode. Could you include the last note given, if not, make out the note for one year and send it for signature.

"We have decided to rent out our farm to several renters to keep out expenses and the chances of bad crops. Will have nearly 2,000 acres in cultivation to look after for our rent. Yours truly,

"JOHN R. KEACH."

It does not appear that any further correspondence occurred, or that any further action was taken on either side, with reference to the premium maturing May 5, 1888, or to the giving of a note to cover the premiums for a year to come; but we find that Hinman wrote to the local bank on the 26th of April, 1888, as follows:

"ORNAN PIERSON, Esq.

"*Dear Sir*—Draw on me for \$10 and take care of that Keach note on 29th; don't let it come back. They give annual notes hereafter. Truly, etc.,

"B. P. HINMAN."

And on the 1st of May, 1888, as follows:

"FRIEND PIERSON:

"I wrote you last week about the Keaches and their note, to draw on me for \$10 as before, and not let the note come back. They propose to pay annually hereafter and not have this quarterly occurrence. Truly, etc.,

"B. P. HINMAN."

The omission of the assured to follow up the matter may be easily accounted for, as they were accustomed to depend upon Hinman to prepare and forward the notes to them for execution, and as they had indicated a willingness to change the mode of payment from quarterly to annual, and had requested him to "make out the note for one year, and send it for signature," in case he did not wish to include the note he then held for the February premium. In view of the former course pursued and the never failing disposition shown by him to keep the insurance alive by accepting their notes which, though slow, he considered good (and they were all paid, though some of them not until after the death of John R. Keach), and of the fact that he had proposed the plan of annual payment as

far back as May 11, 1886, in a letter of that date, they were justified in expecting that he would, in due time, send them the note for the annual payment including the May premium, for their signature. It is clear that he intended to do so, as late as May 1st, only four days before that premium was due; and there is evidence tending to show that the note was not sent, because of mere neglect on his part. In his testimony he asserted that he did not intend to send it, as he had become weary of conducting the business in that way, though he gave them no notice of his change of purpose; and on cross-examination he could not remember saying to Mrs. Keach at her home in August, 1888, that he had forgotten it, and was himself to blame for not sending the note. Mrs. Keach and another witness, entirely credible, testified that he did so state, and this contradiction goes very strongly to prove that the omission was accidental rather than intentional. It appears from his letters, as well as from his testimony, that the home office was aware that he was taking notes for the premiums; and on one or two occasions he sent the notes to the home office. He always avowed that in so taking notes he was acting on his own personal account, and was himself assuming the burden, but it is not probable this would have been done on his part or tolerated by the company unless he and the company found it worth while to do so; and from the constant and regular course pursued it was to be presumed that the practice would be continued until notice to the contrary. When the practice of an insurance company and its course of dealing have been such as to induce the belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted upon, the company will not be allowed to act upon such forfeiture as against one in whom their conduct has induced such belief. *C. L. I. Co. v. Warner*, 80 Ill. 410; *May on Insurance*, Sec. 361.

It is well settled that an insurance company may authorize its agent to waive forfeitures, and that it is not bound to act upon the declaration in the policy that agents have no such authority. Such provision is for the benefit of the company, and whatever may be contained in the policy as to the mode

and time of payment, the company may waive it, and with the consent of the assured, adopt an entirely different mode and time. *E. L. I. Co. v. Fahrenkrug*, 68 Ill. 463; *Home, etc., Insurance Co. v. Myer*, 93 Ill. 271; *Insurance Co. v. Newton*, 96 U. S. 234.

We are of the opinion that the jury were clearly warranted in the conclusion that the assured and the agent had an understanding binding upon them both, in regard to the premium due May 5th, that it was waived and postponed until a date which was later than the death of the assured; nor can there be any serious controversy that the conduct of the agent herein ought to bind the company. This disposes of the chief point in the case. All others are minor and incidental.

It is urged that it was error to admit the letters written by Hinman to the local bank, dated April 26th and May 1st, because the assured knew nothing of them and did not act upon them. As we have shown, the assured had abundant reason for supposing Hinman could be relied on to forward the notes, and that no advantage would be taken, if he was so relied on. These letters were merely the declarations of Hinman to a third party, showing that he so understood and intended. They were declarations made while he was engaged in the business of the company, and were competent evidence. Nor is there anything in the objection that the notes were not all paid by the assured in his lifetime. They were taken as money, receipts were given on the faith of their value and obligation, and they were paid in the end. Counsel in their brief make a general objection to the action of the court in giving instructions three and four for the plaintiff, and in refusing instructions asked by the defendant. No particular grounds of objection are stated, and after reading the whole series given on both sides, we find nothing substantially wrong or wanting therein. The law appears to have been presented fairly and intelligently, and while there may be some occasion for verbal criticism, we discover no error of substance. Equally untenable is the objection that the court refused to submit to the jury five questions or special interrogatories. Those questions called for answers

Antle v. Sexton.

which would have settled nothing of themselves and would not have aided the court in rendering judgment. They were not as to the ultimate facts upon which rested the rights of the parties, but as to mere evidentiary facts, which, in connection with others, would have more or less value in determining the ultimate facts. The court properly refused to submit them. C. & N. W. Ry. Co. v. Dunleavy, 129 Ill. 132; T. H. & I. Co. v. Voelker, 129 Ill. 540.

No other points are argued in the brief of appellant. The judgment will be affirmed.

Judgment affirmed.

NATHAN C. ANTLE ET AL.

v.

WILLIAM C. SEXTON ET AL.

32	437
137	430
33	437
51	649

Deceit—Woodland—Sale of—Written Contract—Fraudulent Representations—Damages.

1. An action may be maintained for false representations and deceit used to induce parties to enter into a contract whereby they have been damaged, although the parties may have entered into a written agreement and in such agreement there be a warranty or stipulation upon the point covered by the misrepresentations. The action will also lie if there is no reference in the contract to the subject of such misrepresentations.

2. In the case presented, evidence tending to show that, notwithstanding the property sold did not correspond with the representations, the plaintiffs received their money's worth, was properly refused. Plaintiffs were entitled to the benefit of their contract.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JAMES A. CREIGHTON, Judge, presiding.

Messrs. BROWN, WHEELER & BROWN and PALMER & SHUTT, for appellants.

Messrs. PATTON & HAMILTON and ROBERT MATHENY, for appellees.

WALL, J. This was an action on the case to recover damages for deceit in the sale of a certain saw mill and a quantity of timber standing and growing on certain lands. The plaintiff recovered a judgment for \$900 and the defendants bring the record here by appeal. The special ground of fraud alleged was the representation that the tract of timber known as the Jameson timber contained eighty acres when, in fact, it contained but thirty acres.

It appears that the parties were negotiating for several months and finally agreed upon the price of \$3,000, which was paid. The defendants had represented that they had a contract for the timber on what was known as the Hadley tract for thirteen acres, and, as is alleged, that they had a contract for the timber on the Jameson tract for eighty acres. It appears that plaintiffs were shown the latter tract and the boundaries were pointed out in a general way. When the parties had agreed upon the terms of the bargain they went to an attorney to have a written contract prepared. Defendants had failed to bring the Jameson contract, making some excuse for not doing so, and never did produce it; and the plaintiffs did not learn of the shortage until long afterward when Jamison showed them his copy of the contract. The evidence sufficiently supports the allegation of fraud and deceit in reference to the representations made by defendants in respect to the quantity of this tract. And as to the questions of fact generally it may be said that the verdict of the jury is responsive to the evidence. We consider it necessary to refer only to the questions of law presented by counsel for the appellants.

The written contract made by appellants recited that they, having sold and delivered to appellees for the sum of \$3,000 a certain saw mill, etc., in consideration of said sum agreed, first, to turn over all saw-mill custom they might control; second, that they hereby assign and transfer to said Sexton & Bybee all interest which they have acquired in and to about eighty

acres of saw timber in Gardner township, Sangamon county, Illinois, under a contract heretofore entered into by the said N. C. Antle & Bro., with one S. H. Jameson. Other provisions need not be stated.

On the trial the defendants (appellants) moved to exclude from the jury all the oral agreements and representations referring to the subject-matter of this second clause. The motion was overruled and the point was presented by instructions asked for defendants, which were refused. It is urged that in the action of the court herein there was error, the position of counsel being "that the writing was the best evidence of the contract; that it was the ultimate fact to be proved, and oral proof could not be substituted for the written evidence of any contract which the parties have put in writing; that the writing was tacitly agreed upon by the parties as the only repository and the appropriate evidence of their agreement." The action was not brought upon the contract but upon false representations, and deceit used to induce the plaintiffs to enter into the contract whereby they have been damaged.

It is well settled that such an action will lie though the parties may have entered into a written agreement, and though in such agreement there be a warranty or stipulation upon the point covered by the misrepresentations. Addison on Torts, Vol. 2, p. 1004; Hilliard on Torts, Vol. 1, Secs. 4, 5 and 12; 1 Chitty on Pl. 137, note 4; Ward v. Winian, 17 Wendell, 193; Eames v. Morgan, 37 Ill. 260. And so it will lie if, in the written contract, there is no reference to the subject of the deceitful statements.

In the present instance it is difficult to say what is the significance of the descriptive language used in the second clause as to the quantity of acres in the Jameson tract. It reads that they assign all interest which they have acquired in and to about eighty acres of sold timber, etc. The phrase is rather ambiguous. We are not required to determine whether it amounts to a warranty that the contract they held covered eighty acres, for, as we understand the law, it is immaterial whether the written contract omits any reference to the sub-

ject of misrepresentation or whether it contains a provision of warranty in that respect. The theory of the action is that, for the fraudulent and deceitful representation of the defendant, inducing plaintiff to make a contract which he would not have made otherwise, and by which he has been damaged, he should have his remedy, and this regardless of any remedy the law might afford upon the contract itself.

As remarked by Nelson, C. J., in *Ward v. Winian, supra*: "The fraud is not merged nor extinguished by the covenant, but affords an additional and more complete remedy to the party." We are of opinion the ruling of the Circuit Court upon this point was correct.

The only other point requiring specific notice is as to the measure of damages. The rule adopted was the difference in value between the saw timber obtained and what would have been obtained if there had been eighty acres of it—that is, calculate a shortage of fifty acres, at the price per acre which it was shown to be worth—and the verdict was \$100, less than under the evidence might have been allowed.

In *Field on Damages*, Sec. 706, the rule is stated thus: "In cases of fraudulent representations of the quality or quantity of property sold, the general rule of damages is the difference between the value of the property as it is and what it would be worth if the representations had been true." To the same effect see *Sedgwick on Damages*, marginal page 559, where, after a similar statement of the rule with regard to personal property, the author adds: "The same rule, I apprehend, holds upon the sale of real estate where the action is for deceit." Citing *Whitney v. Allaire*, 1 Comstock, 305. So it was laid down in *Drew v. Beall*, 62 Ill. 164, where the deceit was in regard to quality.

Counsel for appellant urge that there was error in refusing evidence tending to show that, notwithstanding the shortage, plaintiffs got the worth of their money in the whole trade, but we are unable to agree with this position. The plaintiffs were entitled to the benefit of their bargain, as was said in *Drew v. Beall, supra*. There was no contract price on specific items. It was a general price for all, and they had a right to expect everything as represented.

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An expression in *Hiner v. Richter*, 51 Ill. 299, is quoted as supporting counsel's position, when it is said that the plaintiff would be entitled to the purchase money on the deficient quantity, and interest thereon. It does not appear precisely what were the facts alleged, but from the language of the court it would seem there was a contract price per acre, fixed by the parties, and if so, the agreed rate would naturally furnish the basis of damages.

Such was not the case here. We think there is no sound distinction between quality and quantity in this respect. We find no substantial error in the record, and the judgment will be affirmed.

Judgment affirmed.

R. W. BURNEY, FOR USE, ETC.

V.

JOHN B. HUNTER ET AL.

82	441
104	346

Judgments—Unauthorized Satisfaction of—Power to Correct Entry—Jurisdiction.

The Circuit Court of one county has no power, upon a bill filed for that purpose, to cancel or annul an unauthorized satisfaction of a judgment entered in the judgment and execution docket kept by the clerk of the Circuit Court of another county.

[Opinion filed February 14, 1890.]

IN ERROR to the Circuit Court of Sangamon County; the Hon. J. A. CREIGHTON, Judge, presiding.

MESSRS. BEACH & HODNETT and W. B. JONES, for plaintiff in error.

MESSRS. BROWN, WHEELER & BROWN, for defendant in error.

PLEASANTS, P. J. In September, 1878, the Circuit Court of Logan County, in an action by Burney against Hunter and

others in which Hunter alone was served with process, rendered a judgment against him by default for \$7,101.43 and costs. Plaintiff resided in southwestern Texas. His attorneys were Randolph & Leutz of Logan county. Their partnership was dissolved in January, 1880. Leutz removed to Missouri. Thence he opened negotiations with Hunter, who resided in Sangamon county, Illinois, for a compromise and settlement of said judgment, falsely claiming that he had authority from Burney; and in consummation thereof, on October 2, 1880, received \$1,500 in notes, which were discounted by a Springfield bank for \$1,350, and on the 6th wrote below the entry of the judgment on the judgment and execution docket as follows: "I hereby enter satisfaction in full of this judgment, October 6, 1880. R. H. Burney, by E. R. Leutz, Att'y for plaintiff." For this he had no authority whatever, in fact or law. Burney had no knowledge or information of it until 1884, Leutz having meanwhile written to him, or rather to his attorney in Texas, from time to time, of his efforts to collect the judgment and prospects of success. Upon discovery of the fraud Burney took such steps as he was advised to right himself, and among other measures was the proceeding now under review.

This was a bill in equity, filed April 16, 1885, to obtain a decree of the Sangamon Circuit Court which should somehow operate to annul the entry quoted. It sets forth with much circumstantial detail the facts above stated, and avers that his said judgment remains in full force and wholly unsatisfied; that he has never ratified said pretended compromise and settlement nor any of the acts of Leutz in that behalf; that it was all done by fraudulent collusion between Leutz and Hunter, or at least that Hunter was grossly negligent in not requiring the production of proper evidence of authority in Leutz, and that the pretended settlement was void and said entry a cloud upon his said judgment. Leutz was defaulted upon proof of service by publication. Hunter filed an answer denying all fraud or collusion on his part, and alleging, upon information and belief, that Leutz had authority from complainant, or an interest in the judgment, which empowered

Burney v. Hunter.

him to make the settlement; that respondent had a good defense (not particularly stated) to the action in which the judgment was rendered, and employed an attorney who was instructed, but neglected to interpose it. Issue was made up and proof taken and reported by the master; and on final hearing the court made a short decree simply dismissing the bill at complainant's costs. The errors assigned are, the denial of the relief sought and the dismissal of the bill.

We think it unnecessary to refer to the evidence further than to say that in our judgment it fails to show any fraudulent collusion on the part of Hunter, but clearly establishes the charge that the compromise and settlement attempted were wholly unauthorized and fraudulent on the part of Leutz, and therefore void as against Burney. Upon the facts shown, the entry of satisfaction in question was a cloud upon the judgment, so that if the Circuit Court of Sangamon County had power to remove it, upon this bill, the errors are well assigned. We see no other question in the case. The scope of the bill is sufficiently shown by the foregoing statement, and the prayer is as follows: "Your orator prays that upon the trial and hearing of this cause the court render a judgment and decree that said compromise of said judgment, made between the defendants E. R. Leutz and John B. Hunter, was on the part of said Leutz made without any power or authority to make it, was made in fraud of your orator's rights, and to cheat, defraud and swindle your orator out of the benefit of his said judgment; that said entry of satisfaction of said judgment was also made without any right, power or authority of said Leutz to make it; that said compromise and the amount paid therefor (if anything was paid) by defendant Hunter, was not any legal or lawful compromise, settlement, payment or satisfaction of said judgment; that said entry of satisfaction was not the act and deed of your orator, and that said compromise and said entry of satisfaction were both made in fraud of your orator's rights, and for the fraud in making them, and the want of authority on the part of said Leutz to make them, and because your orator has never ratified them, are both null, void and of no force or effect as against your ora-

tor; by decree remove the cloud that they cast upon the present validity of said judgment; by decree remove the hindrance that by virtue of said entry of satisfaction is presented to hinder and prevent your orator enforcing his said judgment; by decree order and direct that said entry of satisfaction be annulled, erased, expunged, or such decree as would be tantamount to the same things. Also decree that the said defendant Hunter, because of the trickery and fraud by which said compromise was procured and said entry of satisfaction made, and the lack of authority on the part of said Leutz to make them, acquired and can maintain no rights as against your orator by virtue of them, or either of them, and that said act shall not be considered as in any wise or to any extent impairing, diminishing or satisfying said judgment. And decree your orator's full restoration to his rights in regard to said judgment, as they would be, had no such pretended compromise or entry of satisfaction been made or attempted. And grant all rules and orders necessary to enable your orator to be replaced in possession of all his rights, and all relief, general or special, which to equity belongs and the nature of his case demands," etc.

What the nature of his case demanded, and all it demanded, was the effectual cancellation of the entry complained of; which could be accomplished only by its erasure or by some other matter of like record, which should be notice of its cancellation to all who would see said entry.

But had the Circuit Court of Sangamon County any power or jurisdiction to grant such relief upon this bill? By what officer, agency or machinery under its control could it lawfully and effectually so deal with a book which the statute required to be kept by the clerk of the Circuit Court of Logan County for the purpose therein stated (R. S. 1887, Chap. 25, Sec. 16, No. 4)? Yet this is all the practical relief asked.

The clerk is not made a party. It is not claimed that the bill seeks, or that the prayer embraces, an injunction against the defendants named, or either of them; nor would it, if awarded, have removed the cloud which impaired the market value of the judgment or restrained the action of the clerk or

Jones v. Hunter.

of any sheriff. The decree asked could not execute itself, nor did it contemplate the intervention of any executive officer. Excepting the relief by actual cancellation of the entry, on the book in which it is made, it would be but a naked declaration of complainant's rights upon facts found. Courts are authorized to find facts and declare rights only in connection with, and with a view to, the exercise of their power to enforce them. We therefore think the bill was properly dismissed—not for want of equity in the case, as stated and proved, but of power in that court to grant the relief required. Complainant was not without remedy, but should have sought it elsewhere.

Decree affirmed.

W. B. JONES ET AL.

v.

JOHN B. HUNTER.

Injunctions—Enforcement of Judgment—Bankruptcy Proceedings—Effect of—Unauthorized Discharge of Judgment—Dismissal of Bill to Annul Discharge—Adjudication on Merits—Alleged Ratification of Discharge.

1. A judgment obtained by default in an action commenced after the defendant had been adjudged a bankrupt, and discharged, is not rendered void or released by such discharge.

2. Where a judgment had been discharged of record, by a party acting without authority from the judgment creditor, the dismissal of a bill filed in another county from that in which the judgment was rendered, to annul such discharge, does not act as an adjudication upon the validity thereof.

3. In the case presented it is *held*: That the acceptance of \$1,000 by the judgment creditor for the assignment of his interest in the judgment, to one alleged to be in community with the party who discharged the judgment, without authority, did not, under the circumstances, act as a ratification of such discharge.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Logan County; the Hon. GEORGE W. HEEDMAN, Judge, presiding.

Messrs. BEACH & HODNETT, and W. B. JONES, for appellants.

The question whether the discharge would have been a good defense in bar in the State Court was never presented; default was taken and judgment rendered. It was a defense that can not now be made available for any purpose, directly or collaterally. *Bowen v. Eichel*, 91 Ind. 22; see 46 American Reports, 574; *Eyster v. Gaff*, 91 U. S. 524; *Dimock v. Revere Copper Co.*, 117 U. S. 559; *Palmer v. Merrill*, 57 Me. 26; *Bellamy v. Woodson*, 4 Ga. 175; *Stewart v. Green*, 11 Paige, 535; *Goodrich v. Hunton*, 2 Woods, 137; *Holden v. Sherwood*, 84 Ill. 92; *Byers v. Bank of Vincennes*, 85 Ill. 425-6.

The decisions of our Supreme Court are clear, plain and unequivocal, holding a judgment obtained as the judgment here, of full and binding force and effect; and that a discharge in bankruptcy, not pleaded or brought to the notice of the State Court, constitutes no defense to such judgment in law or equity. *Boynton v. Ball*, 105 Ill. 627; *Holden v. Sherwood*, 84 Ill. 92; *Byers v. National Bank of Vincennes*, 85 Ill. 423.

Counsel further assert that the judgment was not a new debt, but a security for the old debt. This proposition we expressly deny, and assert the law of this State to be, that the original debt, claim or demand was merged for all purposes in the judgment and could not be used for any purpose thereafter. *Boynton v. Ball*, 105 Ill. 627; *Wayman v. Cochrane*, 35 Ill. 152; *Runnamaker v. Cordray*, 54 Ill. 303; *Harpstrite v. Vassel*, 3 Ill. App. 121.

Negligence of attorney is negligence of client. *Clark v. Ewing*, 93 Ill. 572; *Freeman on Judgments*, Sec. 112.

The decree in the Sangamon Circuit Court case, not being a decree on the merits of the case, is not a bar or estoppel. *Freeman on Judgments*, Secs. 260, 261, 263; *Smith's Leading Cases*, page 673; *Freeman on Judgments*, Secs. 264, 270; *W. A. & G. S. P. Co. v. Sickles*, 24 How. (U. S.) 333; *Bigelow on Estoppel*, pages 50, 51, 53, note 2, 55 text, and note 4, 57;

Hamer v. Brown, 16 How. (U. S.) 354; Waddle v. Ishe, 12 Ala. 308; Greenleaf on Evidence, Secs. 529, 530; Wadsworth v. Connell, 104 Ill. 374-5.

Defendants proposed to prove by W. B. Jones, who was the leading attorney for Burney in the Sangamon Court case, and participated in the trial, that the question of the court's jurisdiction was distinctly made and argued by Hunter's attorneys, and the case went off on the question of the court's jurisdiction and not on the merits. The court refused to admit that evidence and defendant excepted. The court's ruling in that respect was clearly error. Freeman on Judgments, Secs. 272, 274, 821; W. A. & G. S. P. Co. v. Sickles, 24 How. (U. S.) 333; Packet Co. v. Sickles, 5 Wall. 580.

Messrs. BROWN, WHEELER & BROWN, for appellee.

When a judgment is rendered against a bankrupt, in case of suit brought after adjudication for a provable debt existing at the time of the petition, the judgment does not merge the original cause of action so as to constitute a new debt, but is merely a new security for an old debt, and the former debt being barred by the discharge, the judgment is also barred. McDougald v. Reid, 5 Ala. 810; Imlay v. Carpenter, 14 Cal. 173; Blake v. Bigelow, 5 Ga. 437; Anderson v. Anderson, 65 Ga. 518; Rogers v. Ins. Co., 1 La. Ann. 161; McDonald v. Ingraham, 30 Miss. 389; Thompson v. Hewitt, 6 Hill, 254; Johnson v. Fitzhugh, 3 Barb. Ch. 360; Dresser v. Brooks, 3 Barb. 429; Fox v. Woodruff, 9 Barb. 498; Cromwell v. Gallup, 17 Hem. 59; Monroe v. Upton, 50 N. Y. 593; Dawson v. Hartsfield, 79 N. C. 334; Dick v. Powell, 2 Swan, 632; Stratton v. Perry, 2 Tenn. Ch. —; Harrington v. McNaughton, 20 Vt. 293; Downer v. Rosnell, 26 Vt. 397; Stobknell v. Woodward, 52 Vt. 234.

So, under the English bankrupt acts, such a judgment is discharged. Dinsdale v. Eames, 4 Moore, 350.

The fact that the pendency of the bankruptcy proceedings is not pleaded or suggested in the action in which the judgment is recovered, will not prevent the discharge from being a bar. Rogers v. Ins. Co., 1 La. Ann. 161; Anderson v. Anderson, 65 Ga. 518.

The debtor may have an injunction against the judgment. *Stratton v. Perry*, 2 Tenn. Ch. 633.

PLEASANTS, P. J. This was a bill in equity, filed by appellee against appellants May 21, 1888, to enjoin certain proceedings taken by them to enforce the judgment referred to in *Burney*, for use, etc., v. *Hunter*, decided at this term.

It avers that in March, 1877, an action was brought in the Circuit Court for Logan County by Burney against complainant and others on two promissory notes made by them, in which complainant alone was served with process, and that judgment therein was taken against him by default in September, 1878; that complainant had been adjudicated a bankrupt by the United States District Court for the Southern District of Illinois in June, 1876, and was discharged in April, 1878, and thereby relieved from the payment of said notes, which were provable in said proceedings; that he had retained counsel for the purpose of pleading said discharge as a bar to said action, but he neglected to do so; that Randolph & Leutz were the attorneys for plaintiff in said action; that complainant sued out a writ of error from the Appellate Court for the Third District to reverse said judgment; that while the same was pending, Leutz applied to him for a compromise of said judgment; that he represented he had authority, by power of attorney from the plaintiff, to make a compromise and settlement thereof; that complainant's attorneys conducted the negotiations on his part, which resulted in his agreement to give Leutz his notes for \$1,500, in equal installments at one and two years, and at his request complainant arranged with the First National Bank of Springfield to discount them for \$1,350; that this sum was paid to Leutz on the 6th of October, 1880, and thereupon an entry of satisfaction in full of said judgment was made by Leutz, and said writ of error dismissed; that complainant supposed that said Leutz really had the authority he claimed and that said settlement was valid, until September 10, 1884, when he received notice from W. P. Randolph and W. B. Jones, appellees, as attorneys for Burney, of a motion to be made to expunge said entry of sat-

isfaction; that said motion was made, but was by leave of the court dismissed without prejudice; that in April, 1885, said attorneys filed a bill in the Circuit Court for Sangamon County, on behalf of said Burney for use of Jones against complainant, for the same purpose, and that on October 2, 1887, on hearing upon the pleadings and proofs, a decree was made dismissing said bill; that on the 7th of January, 1888, they sued out a *scire facia* to revive said judgment, and two days thereafter an attachment in aid of an action of debt on said judgment, against complainant, which proceedings are now pending, and that he has also received from them a notice of motion for the May term, 1888, of said Circuit Court for Logan County to expunge said entry of satisfaction. These proceedings are by the bill sought to be enjoined. It further avers that about one year before the filing of this bill, Burney brought a suit in the United States Circuit Court for the Southern District of Illinois against Randolph & Leutz, to recover the money so received by Leutz from complainant, and that pending said suit said Randolph, through Jones, who had acted as attorney for Burney in all these proceedings since the rendition of said judgment, opened negotiations with Burney for the purchase of said judgment and settlement of said suit, and on November 25, 1887, obtained an assignment thereof from Burney to Jones, in name, for \$1,000; that said money was furnished by Randolph and so paid for his benefit; that Randolph, as the partner of Leutz, was primarily liable to Burney for the money received by Leutz; that the \$1,000 furnished to Jones and by him paid to Burney, as aforesaid, was but a part of that for which Randolph was so liable, and its acceptance by Burney from Randolph & Leutz, knowing that the judgment had been compromised for \$1,500, and relinquishment of all claim to that sum, was in effect a ratification by him of said compromise.

Thus the grounds for injunction, as set forth in the bill, are, first, that the judgment in question, having been obtained after the discharge of the defendant in bankruptcy and in an action commenced after he had been adjudged a bankrupt, without leave of the bankruptcy court, is void, or released by

such discharge; second, that the decree of the Sangamon Circuit Court dismissing the bill there filed to expunge or annul the entry of satisfaction, is an adjudication against the right to enforce said judgment; and third, that the acceptance by Burney of the \$1,000, ostensibly for the assignment of his interest in said judgment to Jones, was, under the circumstances, a ratification by him of the compromise and settlement of said judgment as made by Leutz. A preliminary writ was granted thereon. The answers of the defendants denied the material averments of the bill, as to the acts *in pais* of the parties respectively in that behalf named, and like issue was made upon a cross-bill by Jones against Hunter. On final hearing upon these pleadings and the proofs, the cross-bill was dismissed and the injunction made perpetual.

The first of these grounds presents a pure question of law, the facts being undisputed. The action was brought after Hunter was adjudged a bankrupt, and the judgment obtained after his discharge. The debt before judgment was provable in the bankruptcy proceedings. It was admitted upon the hearing, on the one side, that this debt was not scheduled, and on the other, that Hunter was not, in fact, aware of its existence, the notes having been made by another member of his firm in the name of the firm. Whether Burney personally had any notice of the bankruptcy proceedings does not appear, but that he had not the statutory notice by mail is to be inferred from the fact that his name did not appear in the list of the creditors.

By Sec. 5106 of the U. S. Stats. (Bankrupt Act of 1867), it was provided that "No creditor, whose debt is provable, shall be allowed to prosecute to final judgment any suit at law or equity therefor, against the bankrupt, until the question of the debtor's discharge shall have been determined; and any such suit or proceedings shall, upon the application of the bankrupt, be stayed to await the determination of the court of bankruptcy on the question of the discharge;" and after excepting certain debts from the operation of the discharge, the act further declares (Sec. 5119) that "a discharge in bank-

ruptcy, duly granted, shall, subject to the limitation imposed by the two preceding sections, release the bankrupt from all debts, claims, liabilities and demands which were or might have been proved against his estate in bankruptcy."

It is seen that the prohibition in Sec. 5106 is not in terms against the commencement of a suit, but only against its prosecution to a final judgment; nor does it make any distinction between suits commenced before the debtor is adjudged a bankrupt and suits commenced after such adjudication. It is conceded by counsel that as to the former, whatever may be the rule elsewhere, it is held in this State that the subsequent adjudication would not *per se* suspend the power of the court, but that the defendant may make formal application, as provided in said section, to stay its proceedings therein until the question of his discharge shall have been determined, and plead it when obtained, if he would have its effect to bar the action. *Holden v. Sherwood*, 84 Ill. 94; *Byers v. Bank of Vincennes*, 85 Ill. 425. But it is contended that where suit is brought in a State court after such adjudication, without leave of the bankrupt court, a discharge, though not pleaded, will bar a judgment for the debt. This proposition is not claimed to be founded in the letter of the bankrupt act, but in its spirit. It is said that upon such adjudication the bankrupt court strips him of all his estate, and undertakes to administer it for the benefit of all his creditors; that he is presumably without means to make a defense; that the judgment in such case does not merge the original cause of action, but is merely a new security for an old debt, and the former debt being barred by the discharge, the judgment also is barred; and that leave of the bankrupt court to bring such a suit is jurisdictional, as in case of a suit against a receiver without leave of the court that appointed him.

We do not understand that the judgment would be a lien upon any of the debtor's estate in the hands of his assignee in bankruptcy, or interfere in any way with its administration for the benefit of his creditors whose claims are proved in the bankruptcy court. Poverty of the debtor is no bar to a prosecution to judgment for the debt. In *Boynton v. Ball*, 105

Ill. 627, it was held, over the authorities cited by counsel, that a judgment obtained against one after he is adjudged a bankrupt does create a new debt—"a debt which can not be proved against the bankrupt's estate; that the indebtedness existing prior to the recovery becomes merged in the judgment"—citing *In re Gallison*, 2 Lowell C. C. 74, in which it was held "upon careful examination of the decisions" that such a judgment "creates a new debt, and that the judgment creditor can not oppose the discharge because he has no provable debt and because the discharge will be no bar to the judgment." To the same point the court cites also *Bradford v. Rice*, 102 Mass. 472, in which the further reason why the bankrupt can not impeach such a judgment is given, that the judgment creditor by thus changing the form of his debt elects to look to his debtor personally and to abandon the right to prove against his estate, and the debtor, who might have protected himself by applying for a stay and pleading his discharge when obtained, by omitting to do so waives the right to set up his certificate of discharge against the new debt. Our Supreme Court adopts that reason also, and though in the case before it the suit was commenced before the defendant was adjudicated a bankrupt, yet because he had time and opportunity to interpose that adjudication for a stay of the proceeding until he could obtain a determination of the question of his discharge and plead it if obtained, but neglected to do so and voluntarily submitted to a trial, he was held bound by the judgment. So here, Hunter was personally served with process. He then knew that he had been adjudged a bankrupt, and neglected to use the means provided by the act for his protection against a judgment; for the negligence of his attorney is imputable to him. We also see no reason why the rule should not apply here, as well as if the suit had been brought before such adjudication, and in case of a judgment by default as upon trial and verdict. It appears that appellee filed a bill in equity to set aside the judgment and let him in to defend, on the ground of the neglect of his attorney, and that it was dismissed on demurrer thereto sustained. If the argument here made in his behalf is sound, he

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might have made a vigorous attempt to defend under divers pleas in bar, and being defeated, yet have his injunction against all proceedings to enforce the judgment.

In the case of a suit against a receiver, as such, the court thereby has actual notice of the situation—and judicially knows that he is but an instrument of the court that appointed him, and not to be sued in another without its leave. Not so here.

For these reasons we are of opinion that the proceedings in bankruptcy did not affect the validity of the judgment.

As to the claim that Burney ratified the compromise made or attempted to be made by Leutz, we think the averments of the bill on which it rests are not sustained by the proofs. So far as it appears the law firm of Randolph & Leutz was retained to bring the suit against Hunter only in the usual way and had only such power and authority in respect to the judgment obtained as were conferred by such retainer. That did not extend to a compromise of it. Leutz did not pretend to act in that matter by virtue of such retainer, or as one of said firm. Hunter must be presumed to have known, and his learned counsel who conducted the negotiation on his part certainly did know, that he had no such authority by virtue of his retainer from Burney and his relation to the firm. They required evidence of special authority to him, without regard to the firm, but unfortunately waived its production through a not unnatural faith in his assurances. We do not see upon what principle Randolph, merely by his relation to Leutz as his partner in the practice of law and in the prosecution of that suit under such a retainer, can be held primarily liable to Burney for the money fraudulently obtained by Leutz while avowedly so acting and clearly understood by Hunter to be so acting. Again, it is not shown, as averred, that for the formal assignment of the judgment to Jones in name, Burney received anything from Randolph & Leutz, nor anything from Randolph. The proof is he did not know or suspect Randolph in the transaction. He dealt alone and exclusively with Jones. How or from whom Jones obtained the money he paid can not be material. If Randolph fur-

nished every dollar of it and under an express agreement from Jones to give him an interest in the judgment or to assign it to him, how would those facts tend to show a ratification by Burney? Surely, that must depend on Burney's intentional act. Neither by his intention nor by his act, in the case supposed, was anything conveyed to or acquired by Randolph; the conveyance was to Jones, and to him not as agent of Randolph, but in his own right. Whatever interest Randolph has in the judgment was acquired from Jones. Now Jones was a competent purchaser. His purchase, if made, was lawful, and not champertous; and if it was champertous, that would not concern Hunter. Being lawful, the assignment transferred to the assignee all the rights in the subject-matter which Burney had before it was made and would have continued to have if it had not been made. Such was the manifest intention of the assignor. He did not receive the \$1,000 in satisfaction or on account of his claim for the compromise money received by Leutz, but for his interest in the judgment, if the evidence is to be believed; and though it had the effect to extinguish his right thereto, if any he had, and to dismiss his suit therefor, it was none the less the consideration for the \$1,000. We hold the facts shown do not amount in effect to a ratification of the fraudulent compromise by Leutz, but are a distinct repudiation of it.

Our view of the character and operation of the decree of the Circuit Court for Sangamon County, dismissing the bill in Burney for use, etc., v. Hunter, is stated in the opinion filed in that case. For reasons therein given we think it was made, not upon the merits, but solely for want of jurisdiction. This seems evident in the light of the bill itself and of the evidence, without reference to the contemporaneous paper signed by the judge, which was offered in evidence in this case. It was, therefore, not an adjudication against his right to have the entry of satisfaction annulled by a court having jurisdiction of the person of the clerk and control of the docket, and to enforce by lawful means the judgment in question.

The decree herein was, in our opinion, against the law and the evidence. Decree reversed and cause remanded.

Reversed and remanded.

C. C. BEDFORD ET AL.

V.

LETTIE L. BEDFORD, ADMINISTRATRIX.

28 455
136 354

Administration—Claim—Equitable Jurisdiction—Dower—Failure to Demand—Support of Minors by Father—Contribution from Children's Estate—Propositions of Law—Unreasonable Number of.

1. A surviving husband, when dower has not been demanded by him, nor set off to him, can not hold one-third of the rents and profits of his deceased wife's lands as against the minor heirs.
2. It is the duty of a father, if his means are sufficient, to maintain and educate his children during their minority according to their station, even though the children have separate estates; and the burden is on him to show the necessity of contribution from the children's estates. The circumstances of father and children are to be considered in deciding what, if any, contributions should be made.
3. In the case presented, this court holds that the County Court, in allowing a claim against the estate of claimants' father for the use by him of land left by the deceased mother, and in passing upon counter-claims thereto, had equitable jurisdiction.

[Opinion filed February 14, 1890.]

IN ERROR to the Circuit Court of Piatt County; the Hon. C. B. SMITH, Judge, presiding.

Mr. C. F. MANSFIELD, for plaintiffs in error.

The claim for a reasonable rent for the use and occupation of the minor children's land, by their father, Stephen G. Bedford, is an equitable claim, and within the jurisdiction of the Probate Courts. *Dormer v. Fortescue*, 3 Atk. 129; *Carey v. Burtie*, 2 Vern. 342; *Perry v. Carmichael*, 95 Ill. 519; *Strawn v. Strawn*, 50 Ill. 263.

The estate of a deceased husband, in the settlement of a claim against his estate, should not be credited with one-third of the rents and profits of his former deceased wife's lands as against minor heirs, when he had made no demand for dower, or where the same was never assigned to him. *Blain v. Har-*

ri son, 11 Ill. 386; Summers v. Babb, 13 Ill. 484; Hoots v. Graham, 23 Ill. 81; Reynolds v. McCurry, 100 Ill. 360; see also R. S., Chap. 41, Secs. 18, 19; Barr v. Peterson, 44 Ill. 259 and 260; Cool v. Jackman, 13 Ill. App. 564; Atkin v. Merrill, 39 Ill. 77-8.

Where a surviving husband did not make a demand for and dower was not set off or assigned to him, in his deceased wife's lands, and after her death he improved the same, she dying intestate, he can not, as against the heirs, recover compensation for improvements placed on the land by him after her death, nor can his estate be credited therewith in a claim by the heir against the estate. Hoots v. Graham, 23 Ill. 83; Wheeler v. Dawson, 63 Ill. 54, 56; Gardner v. Watson, 18 Ill. App. 386, 389; Donnelly v. Thieben, 9 Ill. App. 495, 499.

The father is natural guardian, but has no control of estate of minor. Perry v. Carmichael, 95 Ill. 530; Hunt v. Thompson, 3 Scam. 179, 180.

The father can not charge his minor children with their care and support when he has property of his own, without evidence showing that the interest and welfare of the children demand the appropriation of their property for their support. Gilley v. Gilley, (Me.) 9 A. 623; Fuller v. Fuller, (Fla.) 2 So. 426; Newport v. Cook, 2 Ashm. (Pa.) 332; Clark v. Montgomery, 23 Barb. 464; McGee v. McGee, 91 Ill. 549; Parmelee v. Smith, 21 Ill. 623; Mowbry v. Mowbry, 64 Ill. 383; Brush v. Blanchard, 13 Ill. 46, 47.

Messrs. S. R. REED and H. H. CREA, for defendant in error.

CONGER, J. This action is based on a claim filed in the name of C. C. Bedford and Walter Bedford, minors, by their guardian, B. F. Bedford, against Lettie L. Bedford, administratrix of Stephen G. Bedford, deceased, to recover for money received by the deceased in the use of the land of the minors after the death of their mother.

Ananda Bedford, wife of Stephen G. Bedford, died June 5, 1883, leaving said minors, her only children, and Stephen G. Bed-

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ford, her husband, surviving, he being father of said minor children. She owned ninety acres of land lying immediately west of the ninety acres owned by her surviving husband shown on the plat. They lived on the land of the husband, and used both tracts of land, without making any distinction as to ownership, up to the time of the death of the mother.

After the death of the mother the husband continued till his death, to use both his own and the land of his deceased wife, the same as he had done before her death. Stephen G. Bedford married a second time, March 1, 1885, and died in March, 1888, leaving Lettie L. Bedford his widow. B. F. Bedford was appointed guardian of the said minors after the death of the father, they not having any legally appointed guardian before such appointment. No proceedings were ever had to assign dower to Stephen G. Bedford in the lands of his deceased wife.

Taxes paid by Stephen G. Bedford on the lands of his deceased wife for the years of 1883, 1884, 1885, 1886 and 1887, amount to \$158.85, and in the same time he built fences on the land, costing him \$103.40, and put in the tile, amounting to \$93.61, which he paid. Said Stephen G. Bedford from the date of the death of his wife Amanda to his own death, cared for and supported the said minors out of the proceeds of his own and wife Amanda's lands, at his house or home provided for them. The said minors have not received compensation for use of said lands as direct payment, aside of any claim or credit that the estate may be entitled to for such care and support of said minors. Reasonable rent for the land is \$3 per acre per annum. If the father may charge for the care and support of the minors out of the proceeds of their lands, then \$2 per week for each child would be a reasonable charge for such support. There is a plat attached showing the land of Amanda and of Stephen G. Bedford. The Circuit Court on the trial of the case rendered judgment against the estate for \$151.85 in favor of claimants.

They prosecute the writ of error. It appears from the statement of fact, that the judgment of the Circuit Court was based upon the theory of allowing rents for the period of five

years, deducting therefrom board at \$4 per week for the entire five years and the taxes paid, but making no allowance on the one hand for interest on the yearly balances, or for the tiling and fencing put upon the land of the children. The result reached, is, we think, equitable and fair if the court properly held the law upon the two principal questions involved.

They are, first, can a surviving husband, when his dower has not been demanded by him, or set off or assigned to him in his deceased wife's lands, hold one-third the rents and profits thereof as against the minor heirs. We think the court below held correctly, under the circumstances of this case, that the husband's estate was answerable to the children for the rents of the entire land upon the authority of *Cool v. Jackman*, 13 Ill. App. 564; *Blain v. Harrison*, 11 Ill. 386; *Summers v. Babb*, 13 Ill. 484; *Hoots v. Graham*, 23 Ill. 81; *Reynolds v. McCury*, 100 Ill. 360.

Second. Was it equitable that the estate of Stephen G. Bedford should be allowed credit for the care and support of his minor children, as against this claim? The court below held in the affirmative, and we think correctly. The rule in such case is well stated in *Fuller v. Fuller* (Fla.), 2 Southern Reporter 426, in the following language: "It is the duty of the father, if he can, to maintain and educate his child according to her condition and expectations during the latter's minority, even though she have an estate; but if his means are insufficient, chancery will order an allowance out of her estate for her entire support, or to supplement the father's contribution thereto, according to the circumstances of each case. The child's fortune, and the circumstances of the father, will be considered in deciding what, if any, allowance should be made out of her estate. The burden is upon the father to show the *necessity* for contribution from her estate, and he will be charged with her support during such periods as he does not clearly show the necessity for such contribution." See also, the matter of *Bostwick*, 4 Johns. Ch. 104; *Wilkes v. Rodgers*, 6 Johns. 566; *Schouler*, Dom. Rel., Sec. 238, 323; *Trimble v. Todd*, 2 Tenn. Ch. 502.

The County Court, in allowing this claim against the estate, and in passing upon counter-claims and set-offs thereto, had an equitable jurisdiction, so as to make the amount allowed fair and equitable to both parties to the contest. *Moore v. Rodgers*, 19 Ill. 347; *Dixon v. Buell*, 21 Ill. 203.

The claimants inherited ninety acres of land, the rented value of which is stipulated to be \$3 per acre, while their father owned the same quantity of land adjoining upon which he lived, and from the proceeds of both tracts, supported claimants, himself and his second wife. The law gave him the right to one-third of the rents of claimants' land, being \$90 per annum, as dower in his deceased wife's land, had he taken steps to demand it, or have it legally assigned. Not having done this, he lost his legal claim to such portion of the rents.

The stipulation does not show the rental value of the father's ninety acres, but assuming it to have been the same as the others, the total income of the father would have been \$540 per annum. Under these circumstances we are of the opinion that it was within the equitable powers of the County Court, or, as in this case, the Circuit Court on appeal, to reduce claimants' allowance against their father's estate by the amount allowed for their care and support, and also the taxes paid on the land.

There were *fifty* propositions of law submitted to the court, some of which were held and others refused. This was an imposition upon the trial court, and the court might well refuse to pass upon such a mass of propositions. Whether the court held correctly we shall not undertake to determine, as we are satisfied that the law was properly applied to the facts and a just and equitable decision reached, and it will therefore be affirmed.

Judgment affirmed.

NANNIE E. BEDFORD

V.

LETTIE L. BEDFORD, ADMINISTRATRIX.

Parent and Child—Support of Infant—Liability of Father—Implied Promise—Services Rendered by Wife to Third Party.

1. Where a wife renders valuable services to a third party, he can not defeat a claim for compensation on the ground that she is a married woman, owing all her time to her husband and family. Such an objection can come only from the husband.

2. In the case presented, this court holds that the circumstances proved sufficiently raised an implied promise on the part of a father to pay for the support of his infant child.

[Opinion filed February 14, 1890.]

IN ERROR to the Circuit Court of Piatt County; the Hon. C. B. SMITH, Judge, presiding.

Mr. C. F. MANSFIELD, for the plaintiff in error.

Messrs. S. R. REED and H. H. CREA, for defendant in error.

An action can not be maintained against the parent for necessities furnished his infant child by a third person, unless an express promise is shown or circumstances from which a promise may be inferred. *McMillen v. Lee*, 78 Ill. 443; *Gotts v. Clark*, 78 Ill. 229; *Hunt v. Thompson*, 3 Scam. 179.

Where services are voluntarily rendered by those near of kin, the law will not imply a contract for compensation, but express contract to pay must be shown, or no recovery can be had. *Meyer v. Malcom*, 20 Ill. 621; *Hall v. Finch*, 29 Wis. 278, 286.

CONGER, J. Nannie E. Bedford is the wife of Benjamin F. Bedford. Stephen G. Bedford was a brother of Benjamin F. Bedford, and Amanda Bedford, his former wife, was a sister to the plaintiff in error, Nannie E. Bedford. Their residences were but a short distance from each other. At the time of

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the death of Amanda Bedford, her sister, Nannie E. Bedford was present. Amanda Bedford, the deceased, knew and was conscious of her approaching death. Knowing that she was leaving two little children, one but nine days old, and the other but two or three years old, she asked her sister, in that solemn time, in the presence of death, to take her infant child and raise it, as she wanted no other woman than she to do so. Stephen G. Bedford, the husband of the deceased, was present, as was Nannie E. Bedford, the plaintiff. In compliance with the request of Amanda Bedford, Nannie E. Bedford took the child, Walter, to her home, and Stephen G. Bedford interposed no objections, but frequently visited the child, acknowledging and ratifying all that was done and said by his wife, and consenting that Nannie E. Bedford should care for and raise his child. Benjamin F. Bedford, the husband of Nannie E. Bedford, at no time made any objection to his wife caring for and raising Stephen G. Bedford's child Walter. Benjamin F. Bedford plainly told Stephen G. Bedford, his brother, that he (Stephen G. Bedford) must pay his wife, Nannie E. Bedford, for the raising and care of Walter, as she had done the work.

Amanda Bedford died June 5, 1883. Nannie E. Bedford took the child at its mother's death, and kept it for a period of ninety-one weeks. During the earlier part of this period Nannie E. Bedford, with her husband, Benjamin F. Bedford, resided on their farm, moving to Mansfield in the fall of 1883. Stephen G. Bedford afterward came to town to live with his brother, Benjamin F. Bedford, bringing with him his oldest child, Crews Bedford, he having agreed with Benjamin F. Bedford that for himself and Crews he would pay one-half of the expenses of the family, girl hire, grocery bills, etc. This one-half of the expenses paid by Stephen G. Bedford was \$10 per month. At the end of the time that Stephen G. Bedford lived with Benjamin F. Bedford they had a settlement, and it was expressly agreed and understood that the settlement, paying half of the expenses of the family, did not include the expenses and charge for caring for Walter Bedford. On three different occasions Stephen G. Bedford promised to pay Nan-

nie E. Bedford for the raising of Walter. There is no evidence of any payment or compensation to Nannie E. Bedford for her services other than the attempted proof, on the part of the defendants, to show that she had received a side-saddle in part compensation for the care she had bestowed on Walter. The child required more than ordinary care and attention, but the value of the services rendered was variously estimated by the witnesses.

The claim filed against the estate of Stephen G. Bedford, upon which this suit is based, is for the period of ninety-one weeks at \$6 per week. Judgment was rendered in behalf of the plaintiff against the estate in the County Court, and an appeal taken to the Circuit Court, in both instances the case being tried without a jury before the court. A verdict was rendered in the Circuit Court in favor of the estate, against the plaintiff.

It is true, as urged by counsel for defendant in error, that an action can not be maintained against the parent for necessities furnished his infant child by a third person, unless an express promise is shown, or circumstances from which a promise may be inferred; but in this case we think the circumstances shown in evidence are sufficient to show an implied if not an express promise on the part of the father to pay for the keeping of the child. Mrs. Bird testifies to a conversation between plaintiff in error and the deceased, in which deceased said to her: "I expect to pay you for what you have done for me." Nannie (plaintiff in error) says: "Are you going to give Walter to me?" and he did not make her any answer. She said: "Walter has been so much trouble to me and expense, and I think that you ought to give him to me;" and he says: "I intend to pay you; I know that he has been lots of trouble to you." Mrs. Wilkey testifies that after the deceased had married the second time she heard him say, while talking with her, "that it was an awful care to raise a family, and that he hadn't paid Nannie Bedford for the raising of Walter, but that he expected to some day."

Very slight circumstances would be sufficient to raise an implied promise upon the part of the father, in such a case as

McFall v. Smith.

the present, to pay for the care of his little child. It was his duty to care for it; and because plaintiff in error made no terms with her dying sister when she assumed the care of the child, is no reason why she should bear the burden that all laws, natural and divine, cast upon him. The theory that plaintiff in error raised the child as her own, and therefore was not entitled to compensation, is destroyed by deceased's positive refusal to give the child to her. He thereby repudiated the idea that the child was to be kept by her as her own, and retaining his control and authority over it, promised to pay her for its keeping.

Objection is also made that plaintiff in error, being a married woman residing with her husband, was incapacitated to enter into a contract for the keeping of this child. We see no force in this objection when coming from a party other than her husband. As said in *Casner v. Preston*, 109 Ill. 535, "It is certainly true that no one else can interpose such an objection but the husband." When a wife gives valuable services to a third person, it does not lie in his mouth to say that she owed her entire time to her husband and family. Plaintiff in error was entitled to recover reasonable compensation, and the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

DAVID McFALL

v.

ALICE D. SMITH.

Malpractice—Verdict—Weight of—Issues Improperly Submitted—Hypothetical Questions.

1. A special finding by a jury on one question of fact directly contrary to the evidence, should lessen the confidence of the court in their judgment on other points.

2. Where questions, not properly arising upon the evidence, are so

mingled before the jury with the real issue in the case as to render it doubtful upon what ground they based their verdict, the same should be set aside.

3. Hypothetical questions to experts, not fairly based upon the evidence, and which have a tendency to mislead and prejudice the jury, are to be considered by the court in determining whether a new trial should be granted.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Coles County; the Hon. J. F. HUGHES, Judge, presiding.

Messrs. WILEY & NEAL, for appellant.

There can be no question but this court has, not only the right to pass upon questions of fact, but it is just as much its duty to do it as it is to pass upon questions of law, or as it was the duty of the jury to pass upon the facts in the first instance.

The rule is settled in this State that when there is no evidence to sustain a verdict, or when the verdict is manifestly against the weight of the evidence, the judgment will be reversed. *Reynolds v. Lambert*, 69 Ill. 495; *T. U. & Western R. R. Co. v. Moore*, 77 Ill. 217; *Counselman et al. v. Whitehair*, 14 Ill. App. 74; *Krebs v. Thomas*, 12 Ill. App. 266.

The provision in the practice act that no more than two new trials shall be granted to the same party for the same cause has no application to this court. *Ill. Cen. R. R. Co. v. Patterson*, 93 Ill. 290; *Wolbrecht v. Baumgarten*, 26 Ill. 291; *Stanberry v. Moore*, 56 Ill. 472; *Loewenthal v. Streng*, 90 Ill. 74; *L. S. & M. S. Ry. Co. v. Kuhlman*, 18 Ill. App. 222.

Messrs. JOHN S. HALL, JAMES W. CRAIG and HORACE S. CLARK, for appellee.

The questions of fact in this case have been passed upon by four juries, forty-eight men, good and true, citizens of the same county, all hearing the whole evidence, seeing the witnesses face to face, hearing the instructions of the court and

hearing the arguments of the counsel on behalf of the appellant, learned in the law, and who stand high in their profession; three new trials; and now without error of law insisted upon, it is asked that this court grant them another trial. The first verdict was \$100, the second \$1,500, the third \$2,000 and the last \$900, something less than the average of the four, and we insist that this ought to be the end of it, and respectfully submit to this court that the judgment should be affirmed.

CONGER, J. This was an action on the case brought by appellee against appellant, charging him with negligent and unskillful practice as a physician. Appellee recovered a verdict for \$900 upon which judgment was entered.

The declaration consisted of eight counts, the substance of which appears as follows, as taken from the abstract:

First count avers that defendant was a practicing physician; that as such physician plaintiff employed him, she being about to be delivered of a child, which employment was accepted by defendant, and he so unskillfully and negligently conducted himself, that thereby the plaintiff underwent great and unnecessary pain and anguish, was greatly disordered, reduced, weakened and so remained hitherto, and has been obliged to pay divers other physicians divers sums of money, amounting to \$100.

Second count same as first, except it avers the damages to plaintiff arising from defendant's negligence to be the tearing and lacerating the lower portion of plaintiff's womb, rendering her a hopeless invalid for life, causing her great pain and anguish from thence hitherto.

The third count avers that by reason of negligence of defendant, plaintiff's perinæum was greatly torn and lacerated, causing great pain, etc.

The fourth count avers that through negligent and unskillful administration by defendant to plaintiff of anæsthetics the delivery of her child was delayed until her strength was so far exhausted and her sensibilities so far gone, and her nervous system so far stupified that she was, in consequence thereof,

greatly torn and lacerated about the vaginal orifice and womb.

Fifth count avers that when plaintiff's childbirth sickness began and she sent for defendant, he came and gave her morphine and went away, and when plaintiff sent for defendant at divers other times between the beginning of said sickness and the delivery of the child, the defendant would come, and at each time simply direct the continued dosing of the plaintiff with anæsthetics, leaving the plaintiff to suffer until her strength was exhausted, and causing her to be greatly torn and lacerated about the womb and perinæum.

Sixth count avers that defendant carelessly and negligently went away and slept until plaintiff's strength was exhausted, in consequence whereof she was greatly torn and lacerated about the womb and perinæum.

Seventh count avers that defendant so unskillfully and negligently wrenched the child from the plaintiff that she was thereby torn, etc.

Eighth count avers that at the delivery of her child plaintiff was greatly torn, etc., and that defendant carelessly went away without stitching the lacerated parts, or doing anything else looking to the care of the parts, and left plaintiff in such condition to this date.

The jury returned with their general verdict the following ten special findings, viz.:

1. Did the giving of morphine by the defendant to the plaintiff cause any injury? A. Yes.

2. Did the absence of the defendant at any time after he was first called and before the birth of the child cause any injury to the plaintiff? A. Yes.

3. Did the defendant with his hands tear the perinæum of the plaintiff? A. No.

4. Did the defendant after the child's head was born, forcibly pull the child from its mother without waiting for any labor-pains to assist in its expulsion? A. No.

5. Was it through any fault or negligence of the defendant, that the perinæum of the plaintiff was torn? A. No.

6. Was there any such tear in the perinæum as the ordinary practice of physicians in good practice required to be sewed up? A. Yes.

7. Was the plaintiff injured by anything the defendant did? A. Yes.

8. Was there anything in the treatment of the plaintiff by the defendant that the ordinary skill of the medical profession required defendant to do which he did not do? A. Yes.

9. Was there anything done by the defendant in his treatment of the plaintiff, that the ordinary skill of the medical profession would have required him not to do? A. Yes.

10. Would it have been any to the advantage of the plaintiff, if the defendant had discovered the tear in plaintiff's perinæum at the time of the birth of the child? A. Yes.

While the record is quite voluminous, the vital questions in the case, and the one upon which the right of recovery can be alone placed, is the charge contained in the eighth count. The physicians nearly all agree in their testimony, that if the rupture of the perinæum was as extensive as claimed, by appellee reaching into and tearing the sphincter ani, that there should have been a more thorough examination made, and a majority of the medical experts testify in such case there should have been stitches taken to bring the edges of the rupture together, while some of them think, even under such circumstances, sewing would not be necessary.

But all substantially agree, that if the rupture was no more extensive than is claimed by appellant, and did not involve the sphincter ani, then the treatment given by appellant was proper; so that in our judgment the first and really the controlling question is, did the evidence warrant the jury in finding the rupture to have been as claimed by appellee, viz.: that is, involving the sphincter ani, and therefore requiring at the hands of appellant other and further attention than he gave it. There are seven witnesses, who testify upon this subject from personal examination, two of them appellant and appellee, before the rupture healed, and the other five from an examination of the scars left upon the person of appellee.

Appellee was blind, but testified that her sense of touch had been educated and developed, until she could with her fingers determine the direction, nature and length of the wound as accurately as one could by sight. She says, some

three days after her child was born, she felt such a soreness and misery that she examined herself. Could tell with her finger that she was so very much swollen; that the laceration then seemed to be two or three times longer than it possibly could be. It seemed to be all of two inches. The scar (by which we understand she means the rupture) extended entirely back to the anus and seemed to be back to it—not through it, but into it. It seemed to extend into the muscle of the sphincter ani, but not through it. She also testified that the action of that muscle was positively destroyed for several days; hadn't a particle of control of it for several days, perhaps two weeks.

Mary J. Mitchell, who had been a nurse for several years, waiting upon women in childbirth, was the mother of ten children and had delivered a good many women without the assistance of a physician, testified upon this point that she had examined appellee's private parts since they had healed up—how long after the birth of the child does not appear, except she says that it was the last term of the Circuit Court. She says: "It (the scar) was about one-half inch and then it came around in a kind of a triangle like; both the triangle and the plain split would make it about one inch. It was healed up, but still it was open. Then there was another place on the right side that was torn and that was grown up into a kind of gristle in the shape of a bean and that just kind of hung there in a kind of dangle. The scar is visible, is about a half inch; the open place is about half an inch. The scar looked as if it was to the rear opening, but it had healed up. The scar is right up to the opening."

Rachel Coleman is a married woman and has examined appellee twice; she says: "She is torn from one opening to the other about as near as I can tell. The scar looks about a half inch around toward the left limb. There is a place looks as though it was a half inch right at the birth place. Then there is a place that is about as large as a common-sized bean that never has been healed up. The scar came within the thickness of a pencil or a rye straw of the anus. There is a space of say near a half inch that did not close up. The

scar from one opening to the other has been healed up, but the other, around toward the left limb, it has healed, of course, but has not closed up. She thinks the muscle surrounding the rectum must have been torn through."

Angelina Thompson is a married woman and has six children and states that she made an examination at the same time the two former witnesses did, and says: "There is an open rupture running diagonally from the lower part of the birth place toward the left limb, that is over a half inch, and from the end of that going toward the anus, there is a scar of half an inch; between that and the anus there is no more than the thickness of a slate pencil. There is just inside the birth place on the left side a lump about the size of a large grain of corn, that looks as if the flesh had been torn and had not gone back; it stands loose."

Upon this question appellant testifies that on Monday morning, after the child had been born on Saturday, appellee's husband came to him and told him appellee wanted to see him, that she thought she was torn. He went and made an examination. He says: "I examined her and found a light lateral rupture; my judgment then was about a half inch, a little to the left. It was a tear of the vaginal muscles, but the sphincter ani was not torn. I introduced my finger into the rectum to ascertain whether that was torn, and it was not, and this being a lateral rupture, it had a disposition to come together without stitching. If it had been straight down and involved the sphincter ani, it would have been necessary to sew it, because the muscles must be held together to heal; but it was on the side, and all you had to do was to put it in position to rest, and it would heal itself."

Dr. P. A. Kemper, a graduate of Rush Medical College, and a practicing physician since 1858, together with Dr. V. R. Bridges, a graduate of the same school and with a practice of thirty-five years, made an examination of appellee, just when does not appear, except that it was just after some former trial of the case. Dr. Kemper says:

"This was Sunday following the first trial. It was about 12 o'clock. There was light from the south window. She

was placed in a chair before this window, the parts were exposed, and the first thing after examining the external appearance was to insert the finger into the rectum to see if the sphincter ani muscle was intact. That was satisfactory and the muscle seemed to be all right. The next was to examine the space from the rectum to the fourchette, or birth place, about one and one-half inches. That space from the fourchette down, perhaps a scant three-fourths of an inch, and a little laterally, had the appearance of having been torn and healed up.

"I then introduced the speculum into the vagina and brought the mouth of the womb within the space of the speculum and examined it carefully, as I had been told by Mrs. Smith that her womb was considerably lacerated. I found that intact and all right. I then took a silver catheter about the size of an ordinary goose quill and introduced it into the bladder and the urethra. Sphincter would grip it and hold it straight, showing it was strong and all right. The external parts were all right. There was a peculiar arch of the pelvis. She would necessarily have a hard labor from the peculiar formation of the pelvic bone. Her pelvic bones are acute. The laceration was not straight down, but a little to the left. If the sphincter ani was torn through it would not heal up itself without being held together by stitches. The sphincter ani of plaintiff had never been torn through. The wound is no longer than the scar. You can not tell by the scar how deep the wound has been."

Dr. Bridges says: "Mrs. Smith was in a chair when I went over, in a position to be examined. Dr. Kemper had made his examination, and I found that the sphincter ani and the bladder, so far as I was able to determine by the introduction of my finger in the one and the catheter in the other, the sphincters were perfectly intact. My judgment is they had never been broken.

"It was in perfectly normal condition, so far as I was able to see. There was a scar; there had been a laceration of the soft parts near the vaginal septum and the anus; it had passed to the left of a direct line. The laceration was some-

where near three-fourths of an inch, I think a scant three-fourths from the appearance of the scar and the granulation. There is a scar to the left of the raphe, which is in everybody, about one-half inch in length, probably a scant one-half inch, that indicates union was had without any suppuration, just glued together, union by first intention. It was a clear, smooth scar, just such as you would see if a knife had passed through. Just at the top of the scar the surface would indicate there had been some healing by granulation, that is by the formation of new tissue. There is a granulated surface that may have been one-fourth of an inch and may have been less. I am sure it was not more than a quarter. So the rent was about three-fourths of an inch extending toward the left.

"I don't think the union would have been better with a stitch than it is now. I don't think there could have been any improvement. There would have been no better union with stitches than there is now.

"I didn't observe any laceration on the right side. I examined it. There was no loose flesh hanging there, nothing there but what belonged there."

This was all the direct evidence there was upon this point. Some of the physicians thought that the length of the scar as testified by appellee's witnesses would indicate that the rupture involved the sphincter muscle, while others were of opinion that had such muscle been seriously torn, it would not have healed up as it did without having been sewed.

We have no hesitation in saying that from an examination of the evidence contained in the records upon this question, it is very far from satisfying us that appellee had any preponderance of testimony, but there were some other circumstances to which we have not yet alluded. It was sought to impair the testimony of Dr. Kemper, first, by some impeaching questions, and, secondly, by trying to show that he had, at the instance of appellant, sought an opportunity to examine appellee and was not, therefore, entirely impartial.

We do not care to express any opinion upon the degree that this might detract from the weight to be given to his

evidence, for if it appeared that the question of the extent of the wound had been fairly passed upon by the jury unaffected by other matters which, we are inclined to think, did improperly, and to the prejudice of appellant, enter into its consideration, we should perhaps not feel warranted in interfering with their verdict.

One of the charges of improper practice was the administration of morphine prior to the birth of the child, and the jury have specially found that such administration caused an injury to appellee. The only witness in the entire record who states that it would not be good practice is Mrs. Mitchell, while every physician whose attention is called to the question, and there were six of them, says that under the circumstances such administration was proper and according to good practice. If the jury have so utterly misconceived and misapplied the testimony upon this point, it materially lessens our confidence in their judgment upon others; nor can we know how far the jury may have been influenced in their general verdict by their mistaken views upon the question of the administration of morphine.

Again, the hypothetical cases supposed in framing questions by counsel for appellee, to be put to the physicians as experts, were unfair and misleading.

It is true the rule allows counsel to frame questions upon such theory and upon such facts as he may choose, leaving it for the jury to determine whether such supposed facts are shown by the evidence or not, still, when it is apparent, upon a review of the case, that such questions as are asked have had a tendency to mislead and prejudice the jury, they should be considered in determining whether a fair trial has been had. One of these questions assumed that appellant had with his fingers, by pressing against the perinæum of appellee, torn it before the head of the child was born, and then when the child's head was born, that appellant, without waiting for another labor-pain, pulled the child from the mother. Such a theory was not warranted by the evidence. No one pretends that anything like that happened, except that appellee in the agony of child-birth imagined it, which all the physi-

O'Bannon v. Vigus.

cians say is not at all uncommon, while appellant and the nurse, Mrs. Smith, both say nothing of the kind happened and the jury specially found that no such thing occurred.

We refrain from further comments upon the evidence because we think this cause should go to another jury; for after a careful examination we are convinced that there has not been a fair presentation of the real question to the jury, but that matters about which appellant has clearly not been negligent and those which may be regarded as debatable, have been so mingled before the jury, as to make it doubtful, at least, upon what they finally placed their verdict. Hence it can not be said that the jury have, from the evidence, found appellant guilty upon the eighth count of the declaration, the only one, as we think, in this record, upon which a verdict could rightfully be based, and for that reason we think the court erred in not setting aside the verdict and granting a new trial. For this error of the court the judgment of the Circuit Court will be reversed and the cause remanded.

Reversed and remanded.

MATILDA O'BANNON, EXECUTRIX,

v.

DARIUS L. VIGUS.

Agency—Authority—Scope of—Forgery—Presumption of Innocence—Receipt—Effect of, as Evidence—Requests to Plead—Questions of Law and Fact—Weight of Evidence—Limitations—Fraudulent Concealment.

1. Where an agent's authority is limited to the settlement and collection of a claim, and he has reported to, and fully settled with his principal in the matter of the agency, the subsequent indorsement by the former agent of a check, in the principal's name, though the same was given as an installment on such claim, is not only unauthorized, but, unless done with the intent of at once taking the proceeds of the check to the principal, criminal.

2. The fact of such criminal act, near the close of a long life of apparent integrity, under no special pressure of need or greed, and in the face of great risk, is to be judicially found only upon clear and satisfactory proof. Something more than a bare preponderance of evidence, leaving grave doubt, is required.

82	473
48	96
32	473
71	575

82	473
104	7154

3. Receipts in writing, while evidence against the signer of high character, are not conclusive, but are subject to explanation, correction or contradiction.

4. The weight to be given to such a receipt or admission, and the question whether it has been satisfactorily explained, is for the trial court to decide.

5. A request to find, in trial without a jury, that certain facts, if found to exist, would constitute such a fraudulent concealment as would prevent the statute of limitations commencing to run, should be refused, it being a question of fact, not of law.

6. Requests to find, should present propositions of law only, and in no case assume the existence of any fact in dispute. Such propositions should deal with the facts claimed only as hypothetical, and should state no fact even hypothetically, unless there is evidence tending to prove it.

7. When the court is asked to hold a proposition of law, based upon a hypothetical case, it should be correctly and completely stated.

8. It is not error to refuse a proposition of law already embodied in another holding.

9. It is not error to refuse a proposition of law when there is nothing in the case calling for its application.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Montgomery County;
the Hon. JAMES A. CREIGHTON, Judge, presiding,

Messrs. LANE & COOPER, R. McWILLIAMS and A. THORNTON, for appellant.

Verbal admissions ought to be received with great caution. The repetition of the statements of O'Bannon, ten years after they were heard, is subject to much imperfection and mistake. He may not clearly have expressed his own meaning, or the witness may have misconceived or misunderstood him. Without any intention a word may be forgotten or altered, which would change the meaning. Mr. Greenleaf says: "In a somewhat extended experience of jury trials, we have been compelled to the conclusion, that the most unreliable of all evidence is that of the oral admissions of the party." Greenleaf on Evidence, Vol. 1, Sec. 200; Bragg v. Geddes, 93 Ill. 39-60.

There was not sufficient evidence to remove the bar of the statute of limitation. "Every false affirmation does not

amount to a fraud. A knowledge of the falsity of the representations must rest with the party making it, and he must use some means to deceive and circumvent." S. S. & S. E. Ry. Co. v. Rice, 85 Ill. 408.

There is not sufficient proof that O'Bannon knew the statements complained of to be false; and if he did not, then fraud can not be imputed to him. Tone v. Wilson, 81 Ill. 533.

The representations must not only be untrue when made but they must be known to be so by the person who made them, and they must be such as an ordinarily prudent man would rely upon. Grier v. Puterbaugh, 108 Ill. 607; Holdom v. Ayer, 110 Ill. 451; Mitchell v. Deeds, 49 Ill. 423.

This attempt to blacken the memory of the dead should not be looked upon with toleration.

Fraud, on the part of O'Bannon, has not been clearly made out. It can only be inferred from doubtful and equivocal testimony, and from the absence of proofs. Walker v. Carrington, 74 Ill. 453.

Messrs. GEORGE L. ZINK and JAMES M. TRUITT, for appellee.

The evidence is overwhelming in support of the proposition of fraudulent concealment of the cause of action, when measured by the rule announced by the Supreme Court. If Mr. O'Bannon received appellee's money, his conduct was such as to remove the bar of the statute of limitations. When this case was before this court on the first appeal, the court affirmed the judgment of the Circuit Court, which was then against appellee and in favor of appellant. You then said, in discussing the statute of limitation: "In such a case the statute, where it applies as a rule, is *prima facie* a just and necessary as well as a full protection, which should be denied only where the cause of action is both fairly proved and fairly shown to be within the exception. Both of these issues were made and tried. We need not say that the finding was clearly right upon either; but we are clearly of opinion there was evidence sufficient to support it upon either." If there is any evidence to support the findings of the fact of the trial judge, they will not be disturbed. Montague v. Dongan, Supreme

Court, Mich., 12 Western Rep. 447. Our own courts, both Supreme and Appellate, have by a long line of decisions held that under the well established practice in reviewing courts, the judgment of the lower court must be affirmed in cases where there is no error of law, and the facts have been found by a jury, on consideration of conflicting evidence, and the verdict is not clearly against the preponderance of the evidence, and where they had the witnesses before them. The findings of fact by the trial judge is entitled to at least as much weight, and must be held at least as conclusive, as the verdict of a jury. We take it that appellee has a good case without the testimony of Ryan, and with his testimony appellee has conclusively shown that O'Bannon got the money. By Ryan we show that he was to get the money; by the receipt, sustained and corroborated by Miller, and all the facts and circumstances of the case, we show he did receive the money, and having so shown, the Circuit Court committed no error in rendering judgment for appellee.

In their brief, counsel say: "Fraud, on the part of O'Bannon, has not been clearly made out. It can only be inferred from doubtful and equivocal testimony, and from the absence of proofs." We quote from the opinion of the Supreme Court, *Vigus v. O'Bannon*, 118 Ill., bottom of page 347, where they say: "In the investigation of a charge of fraud, courts should be liberal in the receipt of evidence tending to disclose the true nature of the transaction. Very slight circumstances, apparently trivial in themselves, when joined with other facts, may afford irrefragable proof of fraud." *Bigelow on Frauds*, 476; *Bump on Fraudulent Conveyances*, Secs. 541, 560.

What circumstances will amount to proof of fraud can never be matter of general definition. The legal test is the sufficiency of the evidence to satisfy the understanding and conscience of the jury. Fraud need only be proved like any other material fact. *Carter v. Gunnels*, 67 Ill. 270; *Bullock v. Narrott*, 49 Ill. 62.

And when the circumstances proved are so strong as to produce conviction of the truth of the charge, although there may remain some doubt, then it is proved. This is believed

to be the extent of the rule that fraud must be proved. *Bryant v. Simoneau*, 51 Ill. 324.

PLEASANTS, J. This case has been before this court and the Supreme Court on the record of a former trial, and their respective opinions are reported in 19 Ill. App. 241, and 118 Ill. 334. Although quite fully stated in each of them, a restatement of it here seems necessary to an intelligible presentation of our views upon the record as it now stands.

It was a claim filed June 30, 1884, in the County Court of Montgomery County against the estate of appellant's testator for \$3,000, charged to have been collected by him in 1875, for appellee, on a policy of insurance upon his mother's life; and to avoid the bar of the statute of limitations, it was further charged that the fact of such collection was fraudulently concealed—that appellee did not discover his alleged cause of action until late in 1883, and could not, by reasonable diligence, have discovered it sooner. The policy was issued by the Protection Life Insurance Company of Chicago, May 22, 1872, for \$5,000, payable to appellee within ninety days after proof of death received. The insured died October 12th, proof thereof was submitted November 28th, and approved December 16th, all in 1874. Early in January, 1875, O'Bannon, at the request of appellee, took the policy to Chicago to settle and collect the claim thereon. Upon his return a few days thereafter, he delivered to appellee the company's check on the Fidelity Savings Bank and Safe Depository of Chicago, dated January 5, 1875, and payable to appellee, for \$1,000, and its note of the same date at sixty days, for the further sum of \$1,000. He then told appellee that this was all he could get; that the company resisted the claim on the ground of alleged misrepresentations of the health of the insured, and that only through the personal friendship of his old acquaintance, A. W. Edwards, the secretary and manager of the company, he had been able to get the \$2,000 as a compromise. Appellee was then but a little past his majority, had lost his father many years before, and his relations to O'Bannon had long been as nearly as possible those of a son. On his advice he accepted the check and note as payment in full, and signed

a receipt to that effect, which was immediately sent to the company, and was received by it on the 9th. It was expressed to be a receipt of payment "in full of all demands under the policy" therein specified, without stating any amount; was dated, like the check and note, on the 5th, and had been drawn up by the secretary himself, in the company's office at Chicago.

Appellee never received anything more on the claim. But on the 4th of March following, a check of the company was drawn on the same bank, payable to him and on account of said insurance, for \$3,000, which check was returned by the bank paid, late in June, and was then placed by Mr. Terpenny, the company's bookkeeper, in its vault with the other papers relating to the case. And that was the last that was shown, or so far as appears, is known of that check. In August, 1877, the company failed and its affairs went into the hands of a receiver. All the other papers relating to this claim were in their proper place, but this check, carefully searched for, was never found. Edwards had control of the vault, though others in the office also had access to it until the failure. He removed to Fargo, Dakota, in 1879. There his deposition was taken in behalf of appellee, but was read in evidence by appellant. In that remarkable statement he denies all recollection of any settlement or even of the existence of this claim. Checks of the company were always signed by the president, if he was there, but the president remembers nothing of this one. By whom it was signed, how and by whom indorsed, when and to whom paid, and when, how, why or by whom abstracted, are all matters about which there is not a syllable of direct proof. But it was drawn by the bookkeeper by direction of the secretary, and delivered to him on the day of its date, and he, so far as is shown, was last in possession of it before its presentation for payment. On the 4th of March, the day of its date, as on the 5th and 6th, and generally before and for some months afterward, O'Bannon was at Raymond, in Montgomery county, as appears by entries in his handwriting on the books of the store there, though there were some days, and in some instances

several consecutive days, on which no such entries were made, and nothing was shown to fix his whereabouts at those times. There was evidence tending to prove he was at Chicago in April or May, or early in June, but none that he ever, after he returned the receipt from appellee—which was probably on the 8th of January—had any communication, direct or indirect, with the insurance company or the bank mentioned, or with any officer or agent of either, excepting only his alleged admission to the witness, Miller, to be considered hereafter. In the summer following he removed from Raymond to Litchfield, in the same county, where he had formerly resided and still owned a large amount of property.

For some time after the failure of the company, the management of its affairs by Edwards was the subject of much and severe animadversion. Among the incidents growing out of it was a suit brought by him against a Fargo newspaper company for libel. In that suit the deposition of appellee was taken on behalf of the defendant, at Chicago, in October, 1883, and while there on that occasion, he was informed by Mr. Terpenney that the company had actually paid \$5,000 on his policy, and that a receipt for that amount, indorsed thereon, was signed by O'Bannon for him. This information seemed to surprise him greatly, but he could not then believe his old friend had so wronged him. In the deposition just referred to, he testified with emphasis to his unblemished reputation, and to his own implicit faith, founded on personal knowledge and experience, in his integrity and friendship. O'Bannon was then on his death-bed, and died on the 15th of the next month, in the county of Montgomery, at the age of about seventy-five years. During the last thirty years he had resided and done business in that county, and had accumulated thereby an independent fortune.

Appellee first brought a suit against Edwards for the recovery of this \$3,000 and interest; but afterward, whether because he then saw no way to avoid the effect of this receipt as a defense for him, or for what other reason, if any, does not appear, dismissed it, and filed the claim herein as above stated. If it had any foundation in fact, then this old man, of

established reputation for honesty, who had no need of the money, who had contributed to the proof of appellee's title to it, who as a friend had undertaken to collect it for him, and who through so many years had been unfailingly faithful and generous to him, had at last betrayed his trust and by the basest of frauds robbed him of \$3,000, sacred as the insurance upon his mother's life; had lived for nearly nine years thereafter with the burden of this crime upon his conscience and its fruit in his pocket, on terms of unbroken intimacy with his victim and his family and in the unabated esteem of his neighbors, and died without a sign of remorse or guilt. The County Court disallowed it, the Circuit Court, on appeal, trying the case without a jury, also disallowed it; and this court, on further appeal, affirmed that judgment, as well supported by the evidence, notwithstanding certain rulings which were recognized as erroneous, but for reasons stated deemed immaterial.

The principal issue of fact was whether O'Bannon ever received from the insurance company on account of the policy in question, anything more than its check and note of January 5th, which he delivered to appellee. If he did, it is conceded he must have received it by the check of March 4th. That check was made payable to appellee or his order. It was not indorsed by him nor by his authority. We thought the theory of appellee's case, which was that O'Bannon indorsed it, imputed to him the crime of forgery. Counsel now say the Supreme Court held it was not forgery. The assertion is unwarranted. What the Supreme Court said was, that he "may" have signed appellee's name to it "in the same way and under the same supposed authority as he signed such name to the receipt" on the policy. Upon such a question we necessarily form our own conclusions from the evidence alone, and feel at liberty still to insist, with all due respect, that upon the undisputed facts, even the largest charity must deny him the benefit of such a supposition. His agency and authority were limited to the settlement and collection of the claim. On the 8th of January he had fulfilled his mission and returned. On that day he settled with appellee, fully and finally, the matter of his agency—delivered over

to him all that he had collected, reported it as all he could collect, took a receipt "in full of all demands under the policy" and transmitted it to the company. That was the end of the business, and therefore, of his agency and authority in the premises, and he knew it; for he was a man of intelligence and large business experience. *Short v. Millard*, 68 Ill. 292. Hence, if on the 4th of March, or afterward, he indorsed that check, as agent or otherwise, he must have known it was not only unauthorized, but criminal, unless he then intended to carry the proceeds straight to appellee and thus obtain his ratification. But the theory of appellee's case excludes the idea of such intention. His counsel now claim, and quote from their former argument to show they always believed beyond a doubt, that the money was obtained on this check by a fraudulent conspiracy of O'Bannon and Edwards to deprive him of it. If he made it, we must think it was a "falsely making of * * * an indorsement of * * * a draft or order for money * * * with intent to defraud" the insurance company or the appellee, which the statute declares to be forgery; and that the Supreme Court, upon this point, was not fully informed as to the facts. The claim of appellee, then, charged the dead with actual fraud, involving a high crime. The fact of such a lapse, so near the close of a long life of apparent integrity, under no special pressure of need or greed, and in the face of such risks, is to be judicially found only upon clear and satisfactory proof.

In *Walker v. Carrington*, 74 Ill. 453-4, the Supreme Court say, that where such a charge is made long after the facts on which it rests transpired, and the party charged is dead, these circumstances are "quite important" in determining whether it has been "sufficiently proved," and make their own the following language of Judge Story in *Prevot v. Gratz*, 6 Wheat. 497-8: "Fraud or breach of trust ought not lightly to be imputed to the living, for the legal presumption is the other way; and as to the dead, who are not here to answer for themselves, it would be the height of injustice and cruelty to disturb their ashes and violate the sanctity of the grave, unless the evidence of fraud be clear, beyond a reasonable doubt."

It is conceded that the insurance company paid on this policy, in parcels, the full sum of \$5,000—\$2,000 on its note and check of January 5th, which it delivered to O'Bannon and he turned over to appellee, and \$3,000 on its check of March 4th, to somebody not shown, no part of which was ever received by him. The controversy here relates solely to the latter sum, and the principal question of fact is whether O'Bannon got it or is responsible to appellee for it. The evidence relied on to prove that he did, as presented in the former record, consisted of (1) the receipt indorsed on the policy as follows: "Received of the Protection Life Insurance Company five thousand dollars, being the amount in full on the within policy;" which was signed in the handwriting of O'Bannon "D. Vigus by R. W. O'Bannon;" (2) the testimony of Elias W. Miller that in April or May, 1875, O'Bannon told him he had collected \$5,000 on the policy; and (3) alleged representation by O'Bannon to Vigus and others, when he returned from Chicago in January, that he had there seen letters to the company from a brother and sisters of the insured, named, stating that she had died of cancer with which she was afflicted before the policy was issued; which representation, if made, is admitted to have been false—no such letter or letters having, in fact, been written.

Receipts in writing, being apparently deliberate admissions of the fact recited, are evidence thereof against the signer, of a highly satisfactory character. Every man of common sense knows that. They are given and taken for that reason, and for that only, and every man gives and takes them. They are so satisfactory that not every man knows they are not conclusive. But the law is that they are not. They may be explained, corrected, contradicted or in any way impeached, directly or circumstantially, by other writings or by parol, just as a verbal admission may be; and experience abundantly shows the wisdom of this law.

In this case, if the receipt in question, when signed, at whatever time, was in blank as to the amount, that fact would make it worthless as evidence to charge O'Bannon with any sum whatever. Or, if it was signed at any time before the

check of March 4th was issued, then also, although it may have been filled out when signed, it was worthless; for up to that time it is certain that he had not, in fact, received \$5,000 or anything representing that sum, nor anything whatever on the policy except the check and note of January 5th.

It bore no date, but the proof was that it was written by Mr. Terpenney and delivered to Edwards on the 5th of January, at the same time with the check and note of that date; that by direction of Edwards he left a blank for the amount, and that at some unknown time afterward, the words "five thousand" were inserted in the handwriting of Edwards. The Supreme Court said there was evidence tending to show that these words and the signature "were written with the same ink and at the same time," but we think this was a mistake as to the time. Mr. Terpenney was of opinion that they were in the same kind of ink, a kind used by Edwards and different from that used by himself; but he ventured no further. He must have been a reckless witness to have undertaken to say, after the lapse of ten years, from mere inspection, whether they were written at the same time or at different times in the short period between January 5th and March 4th. And further, if this court was right in *Collins v. Crocker*, 15 Ill. App. 107, the question was not the subject of expert testimony, nor was Terpenney an expert.

We believed, from the evidence, that O'Bannon signed it in blank as to the amount, on the 5th day of January, 1875, and upon what he intended as a compromise and final settlement of the claim under the policy. This evidence may be classified as relating to (1) the object of O'Bannon's mission; (2) to what was in fact done in the course of it, and (3) to the understanding of those concerned as to its effect.

Appellee had been long employed in the store of R. W. O'Bannon & Son (John D. O'Bannon). He was then about twenty-three years of age and was looking to an interest in the business. To obtain it he needed money. This he had expected from insurance on his mother's life. He was impatient to get it at once upon submission of proof of her death

although it was not due until ninety days thereafter. But the company for some other reason hesitated to pay. In fact it claimed that the policy had lapsed, and had been reinstated only upon condition and assurance that her health was as good as when it was originally issued; that though it had received such assurance, it was in possession of evidence that in the meantime she had been materially injured in a fall in Litchfield, for which she brought suit against the city and recovered damages. Correspondence by mail proving unsatisfactory, it was determined that John D. O'Bannon should go up to Chicago and in person endeavor to arrange the matter; but finally, apprehending that it might be necessary or expedient to submit to some compromise, it was suggested that his father, who had long been acquainted with Edwards, could get better terms, and therefore he undertook it. He went not only to settle, but to collect the claim. What appellee wanted, and wanted at once, was money, or what would be presently available as a means of raising it. He wanted all he could get, and to get it at once was prepared for a compromise on the amount, if found necessary. With this object and understanding O'Bannon reached Chicago on Monday, which was the 4th of January, and on that day entered upon his negotiation with Edwards. On the 5th they had come to some agreement. That it was a compromise and final settlement for less than the full amount of the policy is highly probable from the facts that a compromise was anticipated by the claimant and his agent; that nothing was then due by the terms of the policy, nor would be for nearly three months; that the note and check for \$1,000 each, and the receipt on the back of the policy in full (though blank as to the amount) were then drawn up by Terpenny and delivered to Edwards, while O'Bannon was in the office; that the receipt in full, to be signed by appellee, was also then prepared by Edwards; that the note and check and receipt from appellee were then delivered to O'Bannon and the policy was by him surrendered to Edwards; that Terpenny, though he continued to be the bookkeeper of the company and in the office with Edwards until its failure in August, 1877, never saw O'Bannon again;

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and that the entries he then made on his books showed nothing more than the check and note of that date as paid or given on account of this claim, and that the note was for the "balance due" thereon. He testified that he made his entries generally according to direction or information from Edwards, and could not account for that of the note, as for the balance due, except upon the supposition of his understanding at the time that the check and note were a settlement in full. Edwards himself testified that it was the practice of the company, when it settled a claim, to pay at once all that was to be paid, whether in cash or note, or both, and that the transaction of January 5th, as shown by the papers and entries of that date, indicated a settlement in full for \$2,000. Mr. Hilliard, the president, also testified that though he had no independent recollection of these transactions and could not tell just how he got the understanding, he had always known of this claim as one that had been compromised.

Both Edwards and O'Bannon were intelligent business men. It is not to be supposed, without proof, that the company's check and note for \$2,000 were delivered without taking a receipt therefor. The one in question was prepared when they were delivered, and must have been intended to be signed by O'Bannon as the agent who received them, since another was also prepared to be signed by the absent principal. There is no pretense of proof that he ever signed any other; and hence the inference is almost irresistible, that he signed this at the time he received them. Nor is it to be supposed, in the absence of proof, that O'Bannon signed, as agent, a receipt in full while so large a balance as \$3,000 was yet to be received. If more than the \$2,000 was intended to be paid, no reason appears why the note given was not drawn to include it, or another given for it. For Edwards knew that this loss, according to the course of business, would go into the February assessment; that there were over eight thousand members liable to contribution; that five thousand, under the rule, would require an assessment for the full amount, if the full amount was to be paid; and that the call would be payable within thirty days. It was in fact issued on February 4th, and

so was due some days before the note which was given would mature. He therefore knew the company would be as ready at that time to pay a note for \$4,000 as one for \$1,000. And O'Bannon knew that appellee wanted money or what would enable him at once to raise it.

The fact, if, as we believed, it was a fact, that the receipt, though expressed to be in full, was blank as to the amount, awakened in our minds no serious suspicion. The policy was to be retained by Edwards. Delivering the note and check, he should have a receipt. Except as to the blank, the one indorsed on the policy was in the form generally used upon a settlement, and in the usual place. O'Bannon intended and expected the \$2,000 to be accepted as in full. But being so much less than the amount of the policy, and perhaps so much less than he and appellee had hoped, he did not assume, or Edwards was not satisfied of his authority, to make a final and absolute settlement for that amount, as appears by the preparation of another receipt to be signed by appellee in person. Being referred to him he might insist on more, or a lawsuit as the alternative. The true amount to be inserted was therefore not yet absolutely certain. O'Bannon might well presume that when so ascertained that amount would be inserted; and if not, being in fact received as in full, it would be immaterial to him and his principal, whether any or what amount should be inserted. Under the circumstances, then, we saw nothing strange in his signing the receipt in blank as to the amount, but rather the thing to be expected of a man unconscious of wrong on his own part and without a doubt of the honesty of Edwards. A guilty or suspicious one would have been more apt to hesitate or refuse. It must be conceded that this array of facts strongly tended to prove that O'Bannon signed the receipt while it was blank as to the amount, and when he had received nothing more than the check and note for \$1,000 each. If it warrants the belief of either, it fully explains and overcomes the receipt, and any liability of his estate on the claim of appellee must be established by other and wholly independent evidence.

It should be further observed that every one of these facts

fully appeared in the case in chief as presented by the claimant, out of the mouths of his own witnesses and by documentary evidence introduced by him. Thus the receipt here relied on, as presented to be met by the defense, was already impeached, and by the party presenting it. It was impeached if not on its face, by the *res gestæ* of which it was a part. And it was presented to charge with fraud and crime one who was in his grave, who, when living, knew the facts, but being dead could not testify himself nor guide to other sources of information. Such being the state of the case and of the evidence on this point, the Circuit Court was asked to hold as the law applicable to it the following proposition: "The court holds that the receipt indorsed on the back of the policy of insurance in evidence in this case, the signature to the same being admitted to be in the handwriting of the said O'Bannon, is evidence of a satisfactory character that the said O'Bannon received the amount of money in said receipt specified, and that to do away with its force the testimony should be convincing, and the burden of proof to explain or contradict said receipt rests on the defendant." The Circuit Court refused to so hold and we held that the refusal was not error. But the Supreme Court, after referring to certain circumstances in proof as tending respectively to substantiate and to contradict the recital contained in the receipt, said that while "It was the province of the trial court to decide upon the value of these circumstances, as evidence, and also to pass upon all the other facts in the case," it was at the same time the duty of that court to "apply proper rules of law in determining what weight should be given to the receipt introduced, and what kind of proof should be required to overcome it, and what party should assume the burden of explaining and contradicting it;" and because the language of the proposition was almost identical with that used by that court in *Winchester v. Grosvenor*, 44 Ill. 425, and subsequently approved in *Rosenmueller v. Lampe*, 89 Ill. 212, held that its refusal was error.

We, too, held the opinion thus expressed, as to the province and duty of the trial court. We also held, however, that this

proposition did not lay down any rule of law, proper or improper, to be applied by the trier in determining what weight should be given to the receipt, but assumed to determine it for him absolutely; that testimony tending to do away with its force and more or less convincing, was already in the case on the plaintiff's side, and if sufficient—of which the trier was the exclusive judge—there was no such burden resting upon the defendant. The paper in question was not a record nor a contract, but only an admission which, whether written or verbal, is from its nature open to explanation and contradiction; and we then knew of no law that prescribed the weight to be given by the trier to any such evidence in a given case. On the contrary, we understood it to be settled that the court could not properly say of such evidence, as matter of law, that it was even *prima facie* of any particular weight or character, but at most only that it tended to prove the issue, and hence, that in this case it was for the trier alone to determine whether or how far this receipt was or was not of a satisfactory character, and whether or how far the explanatory evidence was or was not convincing. With such right and duty of the trier the proposition asked can not be reconciled. It does not state that admissions against one's interest is *prima facie* evidence of a satisfactory character, or that receipts or admissions in writing are even more satisfactory than those that are verbal, nor anything in the nature of a rule for determining the weight of evidence; but declares, absolutely, that this particular receipt is in law evidence of a satisfactory character that O'Bannon received \$5,000, which can be overcome only by convincing proof to be produced by the defendant. The cases cited from 44 and 89 Ill. do not seem to us to sanction such an instruction. In neither was any question of law involved. The court, as was its duty under the statute then in force, was reviewing the finding upon the evidence, and as triers, determined in each case that it was wrong—being against receipts which were not overcome; and in that connection they said of receipts in general what is here said of this particular receipt. Thus, as a court they declared the rule, and as triers found the receipts in evi-

dence to be in fact within it. But they have more than once pointedly declared it a perversion of their language, so used, to embody it in instructions to govern triers in other cases. And if the opinion in this case is to be understood as announcing a different view and authorizing trial courts to instruct or hold as law that any specific evidence of this nature, in a given case, is or is not of any particular weight or character, we can see but little use in juries. Hence the refusal of this instruction did not suggest to us the possibility that the learned judge who tried the issue might have disregarded any rule of law for determining the weight, as evidence, of this receipt. This court, as reviewing triers, certainly held it to be *prima facie* conclusive, and no law is claimed to allow it greater force; but we also found it to be fairly overcome, and therefore no evidence at all to charge the deceased with anything more than he had accounted for. Of course it was possible, notwithstanding, that he might have received the \$3,000 or any less sum besides, but this receipt, if false or blank as to the amount when signed, was no proof of it.

Of the next item relied on—the testimony of Miller—we shall have occasion to speak more particularly hereafter. Suffice it to say now it was in effect, that in April or May 1875—before the \$3,000 check was paid—O'Bannon confessed to him confidentially that “he had collected \$5,000 on the policy;” that he had reported it to Vigus as less, and so in the settlement with him had defrauded him of a portion of it; that he feared the relatives were going to give him trouble as they were claiming “the company had not paid enough;” that he knew witness and Vigus were friends, and therefore asked him as a favor, in case anything should be said to him or trouble should arise about it, to urge Vigus to stand by the settlement he had made. This statement impeached itself and the witness who made it. Both were further impeached by his conduct in reference to the matter. According to his account there was a direct proposal to him to become accessory, without fee or reward, to a gross outrage upon the rights of a young and confiding friend; to prostitute his own

professed friendship by advising him to abide by a settlement of which the witness knew nothing and was told nothing except that it was fraudulent. He met the unreasonable and dishonoring proposal without any expression of displeasure, or even a request for explanation or further information. He kept it to himself during all the eight years of O'Bannon's life, maintaining his relations with both the parties, and divulged it only after he had been prosecuted to judgment by the widow, and the claim here in suit, having been disallowed by the County Court, was pending on appeal. His general reputation for truth was also to some extent impeached; and the alleged admission was out of harmony with the character of the deceased and with the mass of undisputed facts in the case.

It would have been enough for us that the trial judge, who heard his testimony and all the evidence, did not believe him, or at least did not believe that O'Bannon's statement, if any was made, was accurately reproduced by him. But we also reached the same conclusion. Evidence of verbal statements, after the lapse of ten years, without any special circumstance to aid the memory of the witness, is liable to error in so many ways and for so many reasons that it is generally to be received with great caution. Every one of these reasons applies with special force in this instance. If O'Bannon said he "had settled a policy for \$5,000"—meaning a policy issued for \$5,000—it would have been entirely and naturally consistent with all else he was reported to have said; the request to witness would have been reasonable and fair, and his conduct afterward would have been fully accounted for without discredit to him. For nobody acquainted with the parties doubted that O'Bannon was a man of large experience and sound judgment in business matters, and especially interested in the welfare of Vigus. On these reasons Miller might well presume, without further information, that the settlement he had made with the company and reported to Vigus was the best that under the circumstances could be effected, and therefore honestly, and as the friend of both, advise Vigus to abide by it.

But ten years had now passed. It had been recently discovered that the company really paid \$5,000 on the policy and that O'Bannon's name in his own handwriting was signed to a receipt indorsed on the policy and purporting to be for that amount. These facts appeared to be against him. This suit was pending, based upon them. He was dead and could give no explanation. His friends were surprised and confounded. How easy and natural for Miller, as an honest man, in view of these facts and recalling the interview testified to, as well as he could, to suppose that O'Bannon's language must have meant—though he did not so understand it at the time—that he had “collected \$5,000 on the policy;” and if he was an unscrupulous man, with a grudge against the widow, the inference against his testimony would be stronger. For all the reasons thus stated or suggested we thought it should not be believed as against the dead.

Lastly, as to his alleged falsehood about the cancer letters, Mrs. John D. O'Bannon and Mrs. Wheeler, sisters of appellee, had testified that the deceased said he saw them, and John D. O'Bannon, his son, was also under that impression. The court below had refused to hear the testimony of the brother and sister of the insured, offered to show that they had never written any such letters or letter, probably regarding it as a collateral issue and immaterial in view of the admitted fact that deceased had not then received anything but the check and note which he delivered over. The Supreme Court say this was error. We also had so held, but thought it did no harm inasmuch as the fact was otherwise sufficiently proved and did not appear to be denied. There were no such letters, and it was and is conceded that O'Bannon's statement, if made, was knowingly false. It was wholly unimportant, however, if he did not afterward receive the money on the \$3,000 check, or some portion of it. Thinking that in connection with the facts that he had been the agent to collect the insurance, that the \$3,000 was paid to somebody, and that appellee did not get it, the false statement might tend to show that the deceased had conspired or formed an intention to get it and appropriate it, we proceeded to consider the evidence

upon the question whether he made it; and for reasons given the conclusion was, it was altogether too doubtful, and the bearing of the fact upon the main issue, if proved, altogether too remote and uncertain to justify a moment's thought of disturbing the finding of the court below. The Supreme Court say "there is no dispute about the fact that O'Bannon claimed to have seen these letters in Chicago," a remark which must have had reference solely to the treatment of the case by counsel in that court. The question, as presented by the record now before us, will be further noticed hereafter. At this point arose also a question under the statute of limitations, namely: Was the statement, if made, such as to fairly put appellee upon inquiry which would have discovered the alleged cause of action or defeated the intended fraud upon him? If so, his failure to make such inquiry was *laches*, the statute then began to run, and the claim when filed was barred.

There is no proof in the record that his mother was afflicted with cancer when the policy issued. Presumably he understood and believed she was not; for otherwise his claim for any amount of insurance was a palpable fraud. Then, upon information that the company had such letters, and wholly or in part upon the false statement therein contained, based its refusal to pay \$3,000 of the claim he believed to be justly due him under its contract, should not a reasonable or any regard for his own good name and diligence with respect to his pecuniary rights have moved him to decline the offered compromise, at least for the present, and proceed to an investigation? Any inquiry of the relatives named as the writers, two of whom then resided at Litchfield, within easy reach, or of the company, would have satisfied him that the letters were forged or that O'Bannon had wilfully lied to him as to a material fact; and in either case the fraud intended would have been defeated and the claim for the full amount would have stood upon its merits. To this point counsel replied that in reference to this matter there was a relation of special trust and confidence between the parties, on account of which the law would justify Vigus in accepting as true, without further inquiry, positive statements of O'Bannon calculated to

prevent such inquiry and to conceal the cause of action. Such a relation having been shown in this case, four propositions of law were submitted on behalf of appellee, numbered respectively 5, 10, 11 and 12, of which the last three were refused. In this we thought there was no error, for the reasons that each of them seemed to be objectionable in several particulars, and all of virtue they contained was clearly given in No. 5. The Supreme Court make no allusion to Nos. 5 and 11, but quote in full Nos. 10 and 12, and say "they should have been held by the trial court to be the law."

No. 10 is, in substance, that if the evidence shows a relation of trust between the parties, and that O'Bannon, as claimant's agent, collected \$5,000 on the policy; that on accounting, he concealed from the knowledge of the claimant "that he had collected said sum," but on the contrary stated the company disputed the claim and refused to pay it in full, and that he had only collected and could only collect the sum of \$2,000 on a compromise, and advised claimant to accept it in full, which statements claimant relied on as true, and so, without further examination, did so accept it, "then the court holds that said O'Bannon fraudulently concealed the cause of action, and the statute of limitations did not commence running until the claimant discovered, or might by reasonable diligence on his part have discovered, that such cause of action existed in his favor."

The Supreme Court itself say this proposition "asked the court to hold that certain facts, if found to exist, would constitute such a fraudulent concealment as is contemplated by the statute." Does not this statement condemn the proposition? Whether there was such a fraudulent concealment, was purely a question of fact. Does not the proposition assume to determine it as a question of law? It does not purport to define fraudulent concealment and leave it to the trier to determine from the facts in evidence whether such a case was here established, but declares, certain specific facts, acts and declarations of the deceased, if proved, would in law constitute it. If there is the slightest shade of difference in principle between this and an instruction that if a party injured by a

railroad train in attempting to cross its track failed to look and listen for it before making the attempt, such failure would in law constitute negligence, we are unable to perceive it. Again, there was not a syllable of evidence in the record to support the hypothesis that O'Bannon, when he accounted and made the statements and gave the advice mentioned, had collected the full amount of \$5,000. The receipt indorsed on the policy bore no date, and any presumption to the contrary was conclusively rebutted by undisputed proof, oral and written, that the check on which \$3,000 of the amount was paid was not drawn until nearly two months after such statements were made. The theory and claim of counsel in argument is not that the fact of such collection was then concealed, for there was no such fact to be concealed, but that O'Bannon then intended and had conspired to make such collection—presenting a different case and question, which the proposition does not fit. With this hypothesis stricken out the whole thing would be a wreck.

Still, again, if in the judgment of the trier the alleged statement of O'Bannon that he saw the cancer letters might have modified the duty as to further inquiry, otherwise resting on appellee, ought not that statement to have been included in the hypothesis of the proposition? We understood and stated the legal effect of the trust relation to excuse the failure to exercise the degree of diligence required in other cases, substantially as do the Supreme Court, but expressed a grave doubt whether the rule applied here. For is not the question, after all, did the party claiming to have been defrauded exercise due diligence under the circumstances, whether the circumstances included the trust relation or not? That relation would justify the party in believing the statement made, and consequently also in pursuing such a course as would be reasonable and appropriate under that belief; but the question would still remain, what was the reasonable and appropriate course under such belief? Had O'Bannon said no more than that he had done the best he could and was unable to get a settlement on more favorable terms, appellee might have been excused for accepting it without further inquiry; but when also informed

that O'Bannon consented to the terms offered because of the surprising statements to the company, was it reasonable that he should ratify it and thus abandon a claim for \$3,000 without inquiry of the parties said to have made them? Upon that question the trust relation, justifying his belief of what O'Bannon said, would have no bearing except to make the reasonableness of further inquiry all the more apparent. And was not that question also, like that of fraudulent concealment, one of fact for the trier, and not of law, as this proposition presented it?

No. 12 was, in effect, that if the evidence shows a trust relation, and that O'Bannon as appellee's agent went to Chicago to settle the claim, and on his return made the statements and gave the advice as set forth in No. 10, and appellee, relying thereon, ratified the compromise reported; "and if the evidence further shows that the said O'Bannon either before or after making said statements and representations, collected from said company on said claim an additional sum of \$3,000, and concealed such fact from the knowledge of claimant, then the court holds that it was not *laches* for the claimant to rely on the representations and statements of the said O'Bannon, and accept and act upon them as true, and make no examination to discover whether they were true or false."

To be applicable to the case supposed of a further collection "after" these statements, should not the hypothesis here also have included a fraudulent conspiracy or intention already formed when these statements were made, to collect this additional sum? Without this might not the hypothesis as stated be true in every particular and yet wholly immaterial? Consistently with them all the settlement reported might have been made in absolutely good faith at the time. If a conspiracy was afterward formed to obtain from the company the further sum of \$3,000, and in pursuance thereof it was obtained, upon whom was the fraud committed? Would the facts that the name and claim of appellee were used to obtain it and the whole transaction was concealed from his knowledge give him any right to it? As applied to the alternative case—of collection "before" these statements were made—which was

shown to have been impossible—what proposition could be more certainly invasive of the trier's province? Whether appellee was chargeable with *laches* was a distinct issue of fact between the parties. In its nature it was a pure question of fact. Yet the court is asked to hold that if the evidence showed certain acts and declarations of O'Bannon stated, the law is there was no *laches* on the part of appellee, and, therefore, the trier must so find notwithstanding his clear judgment, from other facts also shown by the evidence but not embraced in the hypothesis, might have been that there was the gross-
e st *laches*.

Unless the opinion of the Supreme Court in this case is authority for them, this court can make no defense of either of these propositions.

But further, had they fairly stated the law on the subjects to which they relate as applicable to the evidence, was it error to refuse them when the court held as law the one numbered 5, which was as follows: "If a party whose duty as agent requires him to make truthful statements and representations to his principal concerning the subject-matter of the agency, when inquired of by his principal in relation to such subject-matter makes positive statements and representations which are in fact untrue and which he knows to be such, but which his principal believes to be true and does not know that they are untrue, then the court holds that as between such agent and principal it is not *laches* in the principal not to proceed to verify such statements and representations until he has reason to doubt the truthfulness of such statements and representations." It is true this proposition does not expressly define fraudulent concealment. But this is also true of No. 10. It clearly implies, however, that such positive statements by an agent as are herein described would constitute it, and properly leaves it to the trier to determine whether those proved come within that description—which is a better statement of the law than that attempted in No. 10. It also recognizes the relation of principal and agent as one of trust and confidence, and fairly declares its legal bearing upon the question of *laches* here involved. Thus it contains the substance of all the law

referred to in the two refused, and in better form; and were it not that the Supreme Court has expressed an opinion to the contrary, we should still certainly hold, for the reason above given, that their refusal was not error.

The Circuit Court also refused the following: "No rule of law requires all the evidence, or the strongest evidence of the matters in dispute, but only that is excluded which, from the nature of the case, supposes evidence superior in quality or grade behind, in the power of the party whose duty it is to produce the same; that is to say, the party whose duty it is to prove a fact must produce the best evidence which, from the nature of the case, must be supposed to exist of such fact and to be within the control of the party." It might be presumed that a proposition so elementary was not doubted by the court. But we have perceived nothing in the case calling for its application. The Supreme Court says, "the facts to which it was intended to apply were those bearing upon the question whether appellant (appellee here) had begun his suit within five years after the discovery of his cause of action;" that the issue on his part—that he did not discover it until within five years—was a negative one, and that to establish a negative averment plenary proof is not required.

Whatever may have been the intention—which must be found mainly from the expression—we submit, on its face, that this proposition does not refer, either expressly or impliedly, to the distinction mentioned, but is predicated of averments generally, affirmative and negative, and is alike true of both. Nor does it relate to the sufficiency of evidence to maintain an issue of either kind, but is confined to its admissibility. Now, upon the admissibility of all the evidence offered on this issue, the court had already finally ruled, and all desired exception thereto had been noted. Whatever of error there may have been in any of these rulings, whether excluding or admitting the evidence offered, was thus fully preserved and no holding as to this proposition could add to or cure it. We are, therefore, yet unable to see how the holding or the refusal of it could have helped or harmed either

side of the case. The evidence offered by appellee on this issue was the statement of Terpenney that "he seemed to be greatly surprised" by the information as to the receipt on the policy, and the testimony of appellee himself. In one sense at least that of appellee would be of a superior grade or quality—being directly to the fact which must have been within his knowledge, while the other was to a circumstance or appearance from which it could be found only by inference. But the Circuit Court admitted the statement of Terpenney against objection by the appellant, and excluded that of appellee—not, however, on the ground of its supposed inferiority in quality or grade, but because the court held him incompetent under the statute to testify, of his own motion, against an adverse party sued as executrix. The Supreme Court say "he should have been allowed to state such facts, having reference to the date of his receiving the notice in question, as occurred after the death of R. W. O'Bannon;" and speak of the information from Terpenney as having been received after such death. But the court was mistaken as to the fact, or rather as to the time of its occurrence. It was proved, and was expressly conceded, that the information was given in October, 1883, and before the death of O'Bannon, which occurred on the 15th of the following month. He was, therefore, incompetent to testify to the fact, if it was a fact, that this information surprised him; nor can we conceive of any testimony he could have given to maintain this issue on his part that would not have involved the state of his knowledge, and consequently an inquiry into facts that occurred, before that event.

But for the errors thus indicated, the judgments of this court and of the Circuit Court were reversed and the cause remanded. It was then again tried without a jury before another judge, who found the issue for the claimant and rendered judgment thereon for \$5,250 and costs, to be paid in due course of administration; from which judgment the present appeal was taken.

Counsel for appellee assume that the opinion of the Supreme Court substantially settles this controversy. We are told that "since the case was before this court on the

other appeal, the Supreme Court has settled the law contrary to what you (we) then believed it to be. Propositions of law, of a vital character, which this court held bad, the Supreme Court held good. Evidence then and still in the record was not then given the weight which it was entitled to receive."

The preceding statement was intended to show, fully and fairly, the state of the record upon which every question of law or practice touched by the Supreme Court arose, with the views taken of those questions by the two courts respectively. It does show, as does also the opinion in the 19 Ill. App., that this court affirmed the judgment below against appellee's claim, on the evidence relating to the main issue—whether O'Bannon ever received on the policy anything whatever, directly or indirectly, except the check and note of January 5, 1875. It shows we conceded that if he collected more before his settlement with appellee, or even afterward, if in pursuance of an intention then existing, he fraudulently concealed it; and that appellee did not have actual notice of it before October, 1883. It shows that upon said main issue we did allow to the receipt on the policy all the weight it was entitled to receive; that we treated the witness Miller and his testimony with all due charity, and conceded that no such letters as the cancer letters spoken of were written by Mr. Barrett or his sisters, or either of them. Thus upon this issue appellee certainly received in this court the full benefit of his 6th proposition, which had been refused, and of the testimony of his uncle and aunts which had been excluded—as he probably did in the court below notwithstanding such refusal and exclusion; and neither of the other errors indicated had any bearing upon it.

With these concessions of fact, and with the same understanding of the law as that expressed by the Supreme Court, we found that if there was any credible evidence whatever in support of this charge, there was clearly not such as is required to prove fraud as against the dead. The findings on the other issue necessarily followed; for if there was no cause of action, there could have been no fraudulent concealment of it, nor

any question of *laches* in respect to its discovery; and therefore no error bearing on these issues could be material.

But we deny that upon any point in the case the Supreme Court "settled the law contrary to what we then or ever believed it to be." We held there was no error in refusing certain propositions of law, so called, and the Supreme Court held there was; but the difference was between the views taken of the propositions and not of the law. We always believed the law to be that such propositions should state the law only, and in no case find or assume the existence of any fact in dispute; that they should deal with those claimed, whether ultimate or evidentiary, only as hypothetical—leaving the trier unembarrassed in the exercise of his exclusive functions to find them absolutely, from the evidence alone, and to determine the weight of such evidence as a whole, and of every item thereof that is not in its nature conclusive; that they should state no fact, even hypothetically, unless there is evidence in the case tending to prove it; nor omit from the hypothesis any of which there is such evidence and which is material to be considered with reference to the conclusion of fact to which, if established, the law declared would apply; and that it is not error to refuse a proposition that by reason of fault in any of these respects would be likely to work injury, nor one that, though free from fault in itself, is in substance a duplicate of another that is held.

There is nothing in the opinion of the Supreme Court indicating a different view of the law. According to our construction of the refused propositions each and every one of them might have been properly refused for one or more of the faults or reasons stated. Were it at all apparent that the attention of the Supreme Court had been called to the points thus made against them and it differed with us as to their true construction, we would admit our mistake and fully accept the correction; for we recognize the authority of that court to determine conclusively not only the legal effect of a proposition whose meaning is undisputed, but also the actual meaning of it when that is disputed, as well as a pure question of law. But under the statute then in force that court could not

officially know the reasons on which the judgment of this court was founded, and since it made not the slightest allusion to any one of them upon any one of the many points involved, we may doubt if it had any actual knowledge of them as our reasons. Nor need we hesitate to say further that even the highest courts are liable to overlook faults in "instructions" and "propositions of law," which are well known to be faults and become quite apparent when attention is particularly called to them.

Assuming, however, that the propositions were faultless and that their refusal and the exclusion of the testimony of Mr. Barrett and his sisters were errors which materially affected the finding of the Circuit Court, we repeat that they did not affect ours, and think we have here, as in the former opinion, shown why they could not. For all practical purposes we held the proposition No. 6 and admitted the testimony referred to. Had the court below so done and found any cause of action, we must have reversed the judgment—not merely because in our view it would have been against the weight of evidence, but because it would have found no sufficient support in the evidence on the part of the claimant, considered by itself. Our views upon that evidence have undergone no material change. And, therefore, unless the judgment now under review is found to be better supported, it should, for that reason, be reversed. This brings us, after so long a time, to the consideration of the present record; and the preceding discussion relieves us from the necessity of doing much more than to note the changes and additions deemed material. Counsel say that, excepting the additions "the facts presented by this appeal are as nearly like they were before as it is possible to duplicate a case;" but are confident "the additional proofs will remove every objection interposed by this court to the validity of appellee's claim." We think there are some important changes as well as additions, and that they are all against the validity of the claim.

First, in the testimony of Miller. We have said that in the former record it was, in effect, that O'Bannon, confessing his fraud, requested the witness to prostitute his influence to

keep the victim in ignorance of it and secure to the wrongdoer the fruit of it, and therefore characterized his conduct in reference to it with some severity—especially as affecting his credibility. Counsel say we misunderstood him, and that his testimony did not imply an understanding on his part that O'Bannon had done any wrong. Let us see. He said, in terms, that O'Bannon told him *he had collected \$5,000 on the policy; that he had settled with Vigus; that Vigus didn't know how much he had collected; and that he feared the relatives were going to give him (O'Bannon) trouble, as they were claiming the company hadn't paid enough.* As he related it these were the important particulars of O'Bannon's brief statement to him. The facts were too few and distinct to confuse his understanding or burden his memory, and the inferences—too palpable to be avoided or unnoticed—were (1) that O'Bannon had reported the amount he claimed to have collected, for otherwise the relatives could not have understood what it was and so complained that it was not enough; (2) that he had reported it as less than \$5,000, for otherwise Vigus would have known the true amount collected, and being the full amount of the policy there could have been no "complaint" against "the company;" (3) that by false representations he had induced Vigus to accept the amount reported and settle accordingly; and (4) that he had thus defrauded him of the difference between \$5,000 and the amount reported. O'Bannon might as well have told him these facts directly. The request that followed was therefore as base a proposal as could well be made of a man to a man, and to some it would have been as insulting. Counsel seems to have forgotten that in their former argument they themselves treated O'Bannon's alleged statement as a "confession" of guilt, manifested by the facts he stated. Whatever they may now think of our comment upon Miller's conduct in reference to it, he seems to have felt its justice and force; for in respect to the very point and pith of the matter, his testimony in the record now before us is no more like that in the former than innocence is like guilt. He now disclaims any positive recollection of O'Bannon's language, or of the name

of the company then so readily given; which of itself would be well enough; but entirely omits the significant statement that *he said Vigus didn't know how much* he had collected, and also the reason why he feared the relatives were going to give him trouble—that *they were complaining that the company had not paid enough*. Why these were the very points, and the only points appearing solely from his own testimony, that discredited him. It may be presumed his attention had been called to the comments of this court upon the bearing of these statements, but whether so or not, we remain of opinion that his making them on the first trial did discredit him, and think his omitting them on the last discredits him still more. In this connection should be noted also the difference between the two records in respect to his general impeachment. It was felt to be due to him to say, before, that it was not very strong. On the last trial the court again limited the number of witnesses to be introduced on this subject, without objection. Appellant presented seven, the full number allowed—each of whom testified that his general reputation for truth was bad, though one said he would believe him under oath notwithstanding. Appellee presented seven also, to support him; but of these, presumably selected as the best, three admitted, even on direct examination, that it was bad or mixed.

It is said that some or most of the impeaching witnesses having at some time had a lawsuit with Miller, or having a relative who had, for that reason ought not to be believed. Without conceding quite so much force to the reason, we observe that all it has applies to Miller himself, who was formerly shown to have had a like difficulty with the widow, and now another also with the surviving partner of O'Bannon. Thus it appears to us the changes are all the same way, materially weakening the case of appellee so far as it rests upon the testimony of Miller.

Next, as to the cancer letters. Here the only question was whether O'Bannon claimed to have seen them. He had not seen them and the sole object was to fasten upon him a wilful falsehood. There was no other point to this evidence.

Mrs. Wheeler, a sister of appellee, testifies, as before, that he said he saw them or it—for she is not positive whether he said several letters or a joint one—and that it was dated at Litchfield but mailed at Nokomis; but while she then named her uncle and three aunts as the writers mentioned by him, she now names only two. This variance would raise no suspicion of her intention, but serves to show the effect of even the short time between the trials upon her recollection of a merely verbal statement. And we can not help thinking that the circumstance stated of the dating and mailing, goes very far toward explaining, while discrediting, the whole of her story and much of Miller's. In the light of his sense and character and relations to these people, the idea that O'Bannon on his own responsibility openly charged them with volunteering against their dead sister's son and thus sneakingly conspiring to prevent his getting a dollar from the company, and then told Miller that these same conspirators whose statement in writing he said he had seen in the company's possession were threatening to make trouble because the \$2,000 it paid was not enough, is to be challenged, halted and carefully examined before admission.

Mrs. John D. O'Bannon, another sister, also testified before that he said he saw them and named the same writers. But she too now drops one of the aunts, and she does not state that he said he saw the letters. Her language is that he said "the reason they refused to pay the full amount was from the fact they had received letters from my uncle, Mr. Barrett, and my aunts, Mrs. Lea and Mrs. Stearn, saying that mother had died from cancer;" and again "that he found letters there." Neither of these forms of expression necessarily imports that he saw them. They might well be used to mean only that from credible information, or by inference from what he observed, he was satisfied the company had letters; and considering that the very gist of the inquiry was whether he said he saw them—pledged his personal veracity for the statement that such letters had been written—and presuming as we may, that counsel and witness so understood, it looks as if her conscience would not allow her, on reflection, to swear, as before, that he did.

The only other witness by whom the alleged statement was or is claimed to have been proved was John D. O'Bannon, the husband of the one last referred to and son of the deceased. He had an "impression" that his father represented that he had seen such letters from two of the aunts named, but which two he did not understand. He appeared to be candid, but was not clear and positive.

On this point also the changes in the evidence are against appellee. These changes and the new proofs increase our doubt that O'Bannon made the statement imputed to him and our confidence in the explanation we suggested of the positive testimony that he did. Neither of the witnesses pretends to give his language, but only their present understanding of its substance, which almost always involves inference. And it is remarkable that Dr. Wheeler, who speaks of the letters and their effect as the subject of "general talk in the store" did not before, and does not now, state even as his inference or understanding, that O'Bannon ever said he saw them.

The record before us discloses facts in relation to cancer upon which the company, if it had any intimation of them, might have plausibly threatened resistance of the claim, and also hints in relation to its financial condition upon which, in connection with the other matter, O'Bannon might have reasonably consented to a compromise on \$2,000. It is shown that in the negotiation with Edwards the question of Mrs. Vigus' health when the policy was issued, or when it was renewed, was discussed, and the chances on execution in the event of a judgment suggested; and as such companies have many ways of discovering grounds for contesting or compromising claims against them, it is not improbable, though not directly shown (otherwise than by the alleged statement by O'Bannon), that the matter of cancer was specifically referred to. Appellee was intelligent enough to know that if the company really had such letters it would not have entertained for a moment any claim whatever on that policy, but would have answered his first letter with a prompt and peremptory refusal. No opening would have been left for negotiation. O'Bannon must have understood this, and it is therefore well-

nigh absurd to suppose he told appellee that he had seen them, upon any theory of the case. His object was to convince Vigus that the company would not pay more than \$2,000; that if he insisted on more he must expect litigation and delay, and take the risk of losing the whole. For that purpose the statement that he understood or suspected or feared the company was relying on some such information, without indicating its source or precise character, would have been sufficient. It would not have made him responsible for any assertion of fact calling for investigation, nor given occasion to the uncle or aunts to attack him or defend themselves, nor could it have been disproved. Doubtless he did speak of a letter as received by the company and probably as shown to him, relating to the health of Mrs. Vigus, from a traveling agent who might well have written or begun to write from Litchfield, where he obtained his information, and not finished or mailed it until he got to Nokomis. The fact about the cancer, if known outside the family, must have come to be so through the members of the family, or the surgeons. Surgeons are not apt to publish such facts in the first instance. The members of the family at Raymond knew whether they had published them, and if they had not, they would naturally indulge in surmises as to those residing at Litchfield and St. Louis. If divulged at all, the matter would soon be known generally in the neighborhood, and the company be apt to get information of it, and by letters.

It is not difficult to understand from these circumstances how, through the many discussions following O'Bannon's report and settlement, revived after the lapse of years upon the discovery of the \$5,000 receipt, embittered and perverted by this litigation and another unhappy family affair that incidentally appeared in the testimony, with the additions and changes that era inevitable under such conditions, the relatives at Raymond honestly came, in ten years, to believe the story as they tell it.

We think this explanation of the testimony, though merely inference from a few facts and the natural course of things, is rather to be accepted than the belief that such a man as

O'Bannon, in the position shown, told such a lie—so highly improbable, on its face, “so needless, so likely to provoke denial and lead to investigation and exposure, with such consequences to himself—and repeated it from time to time to different persons, with no charge of secrecy, and continued to live for eight years in the neighborhood of everybody interested to deny and disprove it, and yet was never charged with it until after his death.” It harmonizes with the undisputed facts of the case, as the testimony does not, and accounts for some that would otherwise be passing strange.

For example, the fact that though Vigus broke off relations with his uncle and aunts, neither he nor his sisters ever complained to them, or either of them, of the very extraordinary and injurious act in question. How could they have refrained if O'Bannon had, indeed, told them he saw these letters? But mere suspicion that they had by letter or otherwise said anything to throw a doubt upon his claim, arising as we have suggested, while it would account for resentful feelings, would be no basis on which to make complaint to them.

Again: Mr. Barrett soon heard of this talk, but evidently not as a charge definitely and responsibly made. He sent word intended to reach Vigus and his sisters and bring about a meeting, when he could dispel these suspicions and restore the former relations, but never intimated that he understood he was so charged, or supposed that O'Bannon had done him any wrong. After O'Bannon removed to Litchfield he asked him one day if he claimed to have seen such letters, and O'Bannon answered: “Sir, I never heard of such a thing.” That ended the matter between them, as it would not had Barrett understood he was represented as having so claimed. In that case he would have confronted the person so representing with this flat denial, and the fact would have been brought out. Still again: The circumstance already alluded to, of his telling Miller that the relations were claiming the company had not paid enough. He could hardly have told that to a friend of Vigus whom he was requesting to talk with him, if he had himself then accused them to him of writing to the company that he was entitled to nothing. We

have not supposed that Miller's story was a pure fabrication. His last version may well be accepted with the single correction we suggested, viz., that O'Bannon said he had settled a policy for \$5,000, but not, as Miller stated it, that he had "collected \$5,000 on the policy." With that correction it would be natural, consistent with the other facts in the case and his own subsequent conduct, and reflect no discredit upon the character of either. So much for the changes in the testimony of witnesses examined on the former trial.

The new matter includes the testimony of two surgeons and others in relation to the treatment of Mrs. Vigus for cancer of the breast and of appellee's knowledge of the facts. It appears that she was treated for it in 1873 or the early part of 1874 and an operation performed. The surgeons were of opinion it had then existed in an active state for four or six months, and in a latent state for two years or more; but there was nothing more to show that she or the family knew or suspected it when the policy was issued. They must have known it, however, when the renewal was applied for, which was in September, 1874. We do not care to comment on this evidence, nor deem it very material except so far as it bears upon the probability that the subject was discussed between O'Bannon and Edwards, and the range of the surmises among the family and friends at Raymond, upon O'Bannon's return and report, and thereafter until the time of the first trial; and shows how the suspicion and surmises of one came in the lapse of time to be the assertions of others, and the common belief of all. O'Bannon's death and consequent inability to deny, correct and explain, exposed him especially to the dangers of misrecollection, misunderstanding, confusion and variation.

The principal additions relating to the main issue were the testimony of Charles A. Walker, for appellant, and Martin Ryan, for appellee. In January, 1875, and until the following June Mr. Walker was the attorney of the company. It was a part of his business, as such, to examine and settle claims against it. He had long been a prominent lawyer at Carlinville and acquainted with O'Bannon for many years. He took

part with him and Edwards in the negotiation for a settlement of the claim on the Vigus policy. It appears that he was not aware that O'Bannon was in Chicago at that time until he was informed of it by Edwards; that he then talked with each of them separately on the subject, and finally with both together, in his room over that of the secretary. There, in the presence of Edwards, he told O'Bannon that he had been instructed by him to resist this claim on the grounds that Mrs. Vigus was insured after she was injured by the fall in Litchfield, that the representations made to obtain the policy were false and that she was not a fit subject. He says the solvency of the company was also discussed; that he advised him to accept the \$2,000 offered; told him it would be better for Vigus than to litigate, and that the probability was he wouldn't get his money if he got a judgment. His statement is clear and positive, that they then and there "came to the agreement to settle for \$2,000;" that O'Bannon "accepted the proposition and seemed very well satisfied." No question is raised as to the truth or importance of this testimony. But the witness further states that no papers were then drawn up, and that he "had an impression that this settlement was made on a Monday morning" in the latter part of December, 1874, or first of January, 1875. The calendar shows that the fourth of January fell on a Monday, and the note, check and receipt (of Vigus) are all dated on the 5th. Upon these circumstances counsel contend that this testimony, though true, is shown to be of no effect by that of Ryan. He was the actuary of the company at that time and testified as follows: "About the first of January, 1875, in the office of the company in Chicago, at Major Edwards' desk, he introduced me to Mr. O'Bannon and they proceeded to talk about this claim. I can only state the substance. O'Bannon urged the settlement of the claim and *Edwards seemed disposed to favor him*, but said the claim had not been assessed for yet. O'Bannon desired some money immediately, on that occasion. Edwards agreed to give \$1,000 down or a check for \$1,000, and a draft or note at sixty days—I think it was, for another \$1,000, *and the balance when the claim was assessed for and collected*. Major Edwards then

handed me the proofs of loss and told me to see that it got into the next assessment, to be sent out early in February. Mr. Edwards called the bookkeeper and told him to draw up a check for \$1,000 and a draft or note for another \$1,000, which the bookkeeper apparently proceeded to do. The bookkeeper's desk adjoined close by." The claim of counsel is that the agreement testified to by Walker was abandoned and the one stated by Ryan adopted and executed instead. We can not so reconcile this testimony, but are forced to reject the statements of Ryan which we have italicized. In the first place it seems far more probable that the transaction mentioned by Walker occurred on the 5th than on the 4th of January. He said, "my impressions are that it was on a Monday morning. Of course it is simply an impression that has got on my mind. I don't know why I have got the impression." Aside from this, the evidence induces the belief that O'Bannon did not reach Chicago before Monday morning; that he first saw Edwards alone, and talked the matter over with him; that Walker then saw Edwards and they discussed it; and it was after these three interviews that the meeting in question took place. It is not probable that they all occurred on Monday morning. Moreover, it is not probable that after agreeing upon the terms of settlement they postponed its execution. The papers required to consummate it were a check, a note and two receipts—the work of ten minutes and of a clerk. The natural course was to go at once to the room below, which was the office of the secretary and of the bookkeeper, who was to make the entries, and close up the business. But even upon the other supposition, we are asked to believe that this secretary, who, notwithstanding his friendship for O'Bannon, on Monday, for the substantial reasons stated, in the presence and with the concurrence of the company's attorney, committed himself to a peremptory refusal to pay more than \$2,000, and actually got an agreement to settle for that amount, with which O'Bannon seemed well pleased, on Tuesday, without any new light on the subject, and without the knowledge of the attorney, was entertaining a proposition from O'Bannon to settle, and

was so "disposed to favor him" that he would have paid the full amount right down except that it had not been assessed and collected, and actually paid \$1,000 down, gave the company's note at sixty days for another thousand, and a *verbal* promise to pay \$3,000 more, to which all claim had been abandoned, as soon as it should be assessed and collected, and gave directions to have it assessed and collected as soon as possible. Considering further that nothing was yet due, that the financial condition of the company was not such as to justify any needless liberality in the settlement of claims against it and that the bookkeeper at the adjoining desk, who was probably within hearing of the whole arrangement, when he did "proceed to draw up the papers," proceeded further to enter the transaction on his books as a settlement for \$2,000 and no more, the statement that the secretary then agreed to pay the further large sum of \$3,000 seems but little less than monstrous. We can not believe it as against the other evidence in this case, upon the unsupported testimony of Ryan. After a brief experience as a lawyer, he had thought it to be to his interest to become connected with this company. His relations to Edwards were intimate. He was subordinate to, and doubtless to some extent dominated by him. Like Edwards, he went west not long after its failure, engaged in employments of different kinds, for short periods, at different places, and finally followed him to Fargo, where he resumed the practice of law and was his attorney in the libel suit against the newspaper company. He prepared the list of losses for the February assessment, by direction of Edwards, and in the list as presented to and approved by the executive committee this appeared as a loss of \$2,500, which Terpenney said would have been the usual course if it had been settled at \$2,000, because the company issued no policy for \$2,000. We said before it was likely this happened through inadvertence. It does not seem quite so likely now. Walker's age, position and experience gave him greater right and reason to be independent in his judgment and action. His integrity is unquestioned. The evidence leaves the impression that these qualities moved him to sever his connection with the company in

June, 1875. His statement is natural, probable in itself and from the known facts, and strengthens the belief that O'Bannon, on the 5th of January, 1875, settled this claim in perfectly good faith for \$2,000, and took no part in the fraud afterward committed, and which, in that case, was a fraud upon the company and not upon appellee.

Any theory of the case consistent with the evidence which would make his estate liable, must involve a conspiracy with Edwards. He must have known that appellee had settled finally in January. Ever since the ninth day of that month he had his receipt "in full of all demands under the policy." He could not, then, have innocently ordered a check for \$3,000 more in his favor to be drawn on the 4th of March following. The implication of Edwards is fully conceded. Counsel say "we have always insisted, and believe as strongly as we believe anything, that it required more than one person to successfully perpetrate the fraud;" and after quoting from the former argument what they said about "an officer of the company"—but naming none because none had been named by opposing counsel—proceed as follows: "But now that counsel have been driven to openly charge that Edwards abstracted the money, we reply that it was impossible for him to do so without a confederate at the other end of the line who had the confidence of Vigus, and no man had that as fully as Richard W. O'Bannon."

We understand this to mean that from the guilt of Edwards and other conceded or established facts, it would follow that O'Bannon was his confederate in the fraud. Of course, if O'Bannon signed, as agent, a receipt expressed to be for \$5,000, and told Miller he had collected that amount, and lied to Vigus about the cancer letters, and indorsed the check for \$3,000, these facts would be evidence of his guilt without reference to that of Edwards. But whether he did these things, or any of them, are the very questions in issue, and therefore can not be begged. If he did not, there is no evidence against him, unless it is to be found in other acts of his own which are undisputed or proved, and the guilt of Edwards. The position, then, is that the guilt of Edwards, with other

facts established, shows that O'Bannon must have done these disputed things or some others which made him guilty also ; in other words, that Edwards could not have done what he did without the guilty aid of O'Bannon. And the argument here made in support of this position rests wholly on the supposed necessity of the co-operation of one " who had the confidence of Vigus." To what end was the co-operation of such an one necessary, except to obtain a ratification of the settlement he reported and a receipt in full to the company? Is not the argument, then, reduced to the strange assumption that he could not or would not have obtained these if he had in fact made the settlement as reported, and honestly believed it the best he could have made?

With the two receipts in his possession, Edwards needed no aid from O'Bannon. In any case he must use a forged indorsement, and take the risk of discovery by the company of the fraud upon it. These dangers could not be avoided or lessened by any such aid. An indorsement of the check by O'Bannon would have been just as false as an indorsement by Edwards, criminally or otherwise—no less. The money to be paid on it being that of his company, the bank would have accepted as valid any that he recognized, and he could doubtless have found a cheaper tool than O'Bannon. If O'Bannon had indorsed it, the chances of its abstraction would have been lessened and of its discovery—especially after his death—increased ; nor would Edwards have been so likely to forget the fact or so unwilling to state it ; for it would have charged O'Bannon and not him, with the money and the fraud, and prevented inquiry as to some other facts now shown. As to the other danger he had chiefly to fear Walker. The other officers and employes of the company seem not to have questioned his doings. He ordered and it was done. But Walker had personal knowledge that the settlement of this claim for \$2,000 had been agreed on. The former record disclosed no particular reason for the long delay in presenting the check for payment. It now appears that Walker left the service of the company in June. Manifestly, then, the conspiracy, if any, must have been entered into on or before the 5th day of

January, when these receipts were prepared, and the one to be signed by Vigus, together with the check and note for \$2,000 were delivered to O'Bannon; for afterward it would have been useless to Edwards, requiring him without consideration to divide the fruit, and increasing the risk of detection. But, in addition to the reasons already given for believing that O'Bannon then settled in good faith, the evidence shows there could have been no sufficient time before that for the arrangement of such a scheme of fraud. O'Bannon had nothing to do with the matter until just before he went to Chicago, nor any reason to suppose he would have. He went to Chicago expecting to compromise. Counsel admit that the negotiation of Monday, January 4th, resulted in the acceptance by O'Bannon of the offer of \$2,000; that Walker took part in this negotiation, knew the reasons for the compromise and the fact of the agreement upon it. His presence and participation is, to our minds, satisfactory evidence that it was made in good faith. We believe this occurred on Tuesday and was the final arrangement, followed immediately by the delivery of the check and note for the amount agreed on. But supposing it to have been on Monday, who can for a moment suspect that after the settlement in good faith and for the reason so discussed, and before the close of business hours on Tuesday, either of these parties conceived and broached to the other the idea of taking from the company, ostensibly on account of this claim, the further sum of \$3,000 to be appropriated to their own use, and arranged all the details of the scheme for realizing it and avoiding the dangers of detection, immensely enhanced as they were by Walker's knowledge? This would have been impossible even to old pals in crime, and nothing is shown of the relations of these parties to warrant a suspicion that either would thus abruptly confess himself, and dare assume the other to be capable of such infamy.

But without such a conspiracy O'Bannon could not have been guilty. The participation of Edwards was indispensable. Otherwise the check for \$3,000 could not have been obtained. But since Edwards did not need the aid of O'Bannon, the fact

of his guilt, if conceded, is no proof against O'Bannon, but rather tends to exonerate him.

We have shown the improbability, nearly approaching the impossibility, of such a conspiracy. There is not in this record a syllable of direct proof in support of it as a distinct fact; nor a single fact undisputed or satisfactorily proved, from which it can be inferred.

That O'Bannon was the agent of appellee to settle and collect the claim; that as such he received from the company \$2,000, which he paid over and reported as the full amount received; that two months thereafter the company's check for \$3,000 more, ostensibly on account of this claim and payable to appellee, was by its secretary delivered to some person not shown, or fraudulently retained and used for himself; that two months later it was paid by the drawee, upon an indorsement not shown, to some person also not shown; and that O'Bannon was in Chicago at some time after its date and before its payment—these may be established facts, but of themselves they do not tend to prove that O'Bannon had any knowledge of the check or fraud, or in any way, directly or indirectly, derived any benefit from it. That he signed the receipt on the policy after that check was drawn, or thereafter had any communication with or from any agent of the company or the bank, or indorsed it, or took or received anything by means of it—these are at most but inferences from independent evidence claimed to prove other facts, and therefore lend no support to that evidence. That evidence consists of, and the case for appellee rests wholly and solely upon, the face of the receipt as it now appears, the alleged admission to Miller, the alleged falsehood about cancer letters, and the testimony of Ryan.

One living witness, and so far as appears only one, certainly knew at one time whether the words "five thousand" were in the receipt when signed. It was for his interest to prove they were. He was examined, but did not venture to say it. Perhaps it was possible for such a matter to escape his recollection. It is harder to believe he could have forgotten what disposition he made of so large a check drawn by

his express direction. That stands so related to the receipt that his failure to charge O'Bannon in respect to it may be regarded as significant, though negative evidence in his favor upon that point and on the whole case. But whether these words were in or out, the receipt was fairly explained and overcome. Then the testimony of Miller was without corroboration. O'Bannon was not here to deny or explain the statement imputed to him; but on its face and by the circumstances it was shown to be a misrepresentation, whether intended or not. The alleged falsehood about cancer, if proved, would bear but remotely and feebly upon the main issue. Certainly it would be slender ground on which to base a finding and judgment for over \$5,000. We think it was not proved. Without the testimony of Ryan, each of these three items depends alone upon the other two for corroboration. All else in the record is consistent with the innocence of O'Bannon. So far as it tends to prove any fraud it points suspicion against another, and not him—another, whose guilt would account for all the facts proved, without involving him. Each, in our opinion, is so far impeached, either by itself or other evidence introduced on the same side, that it can not stand alone, and much less support any other.

Then, without the testimony of Ryan, appellant would not have been put upon her defense. According to that, Mr. Terpenney must have witnessed the scene described, for he drew up the papers while O'Bannon was in the office, and never saw him there but once. Yet he does not speak of Ryan's presence. He heard no promise to pay \$3,000 when it should be assessed and collected, nor had he any such understanding from any source. His entries show his understanding of a settlement then finally made, and for \$2,000. He states no conversation between Edwards and O'Bannon as then had. The idea we get from him is, that O'Bannon simply waited while he, by direction of Edwards, drew up the papers. That would have been natural if they had just agreed upon the terms in the room above. His statement is opposed also, in some degree, by the fact that the company had some plausible

reason to contend for a compromise and Edwards knew it. The transaction, as he relates it, was not according to business methods, though both the parties to it were business men. His relations to Edwards, and his agency in the assessment proceedings upon this loss, have been before referred to. But if, notwithstanding what may be urged against it on its face, and from other evidence on the same side, it required proof on the part of appellant to overcome it, such proof was abundantly furnished by the testimony of Walker, supported as it is by the known facts otherwise proved on both sides.

To our minds, the consistent and credible evidence in this record strongly tends to prove that O'Bannon was an honest man and a true friend of appellee; that the claim against the insurance company was one which might well be compromised; that appellee expected it would have to be compromised; and that it was, in fact, compromised. We think the finding was against the weight of the evidence; that in a case of this kind, something more than a bare preponderance, still leaving a grave doubt, is required of the plaintiff; that the court should recognize some value in a good name, some protection in a grave. We can not defer to it as a finding under superior advantages, upon conflicting evidence, for there are also conflicting claims to such deference. Other courts have found differently upon evidence not different from that now before us, except as it was stronger for appellee or weaker for appellant. While holding the views herein expressed as to the questions arising, if any do arise, under the statute of limitations—that it was for the trier to determine whether appellee was fairly put upon inquiry by the alleged statement of O'Bannon concerning the cancer letters, and whether he used due diligence to prevent the alleged fraud—we reverse this judgment on the evidence upon the main issue—whether there ever was a cause of action.

The case seems to involve questions of fact that are few and plain, with but little real occasion for instructions or propositions of law. Under our system of practice, the danger that lies in a free use of them in such a case is out of all proportion to the benefits. With a view to ending the unfortunate

litigation with as little more expense and delay as may be, consistently with justice and the law, we are constrained to add that some of those given for appellant, were, in our judgment, not well considered.

The judgment will be reversed and the cause remanded.

Reversed and remanded.

GIPPS BREWING COMPANY ET AL.

V.

CITY OF VIRGINIA.

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Municipal Corporations—Ordinance—Violation—Penalty—Recovery of—Intoxicating Liquors—Service—Default—Motion to set Aside—Sec. 5. Practice Act—Pleading.

1. In an action of debt for the recovery of penalties for divers violations of an ordinance touching the sale of intoxicating liquors, this court holds as erroneous the assessment of attorney's fees in a certain sum upon each conviction, as costs.

2. A failure to allege in the declaration the existence of a provision warranting such assessment in an ordinance, will prevent the recovery thereof.

[Opinion filed February 14, 1890.]

APPEAL from the Circuit Court of Cass County; the Hon. CYRUS EPLER, Judge, presiding.

Mr. A. A. LEEPER, for appellants.

Mr. R. W. MILLS, for appellee.

WALL, J. This was an action of debt by the city of Virginia against the appellant companies to recover a penalty of not less than \$100 and not more than \$200 for each of sundry alleged violations of an ordinance of the city in regard to the sale of liquors.

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A default was taken, and the court assessing the damages found defendants guilty of twelve violations, and imposing a fine of \$100 for each violation, rendered judgment for \$1,200 and for costs, "including the sum of \$5 attorney's fees on each of said convictions, amounting in the aggregate to \$60." The item of \$60 is erroneous. The law makes no provision for such costs. The court might have assessed the penalty at any figure within the limit fixed by the ordinance alleged in the declaration, but it had no power to assess attorney's fees as costs. Counsel suggest the ordinance so provided, but assuming the city had power to incorporate such a provision in its ordinance, it is not so alleged in the declaration. Hence upon the record as it now appears, there is fatal error.

Before final judgment was entered the defendants moved to set aside the default, on the ground, mainly, that the service of process was had upon one Saal, as the agent of the defendants, and that upon the facts disclosed by the affidavit filed in support of the motion, the said Saal was not, at the time of service, an agent of the defendants within the meaning of the fifth section of the practice act.

The motion was denied, and error is assigned upon that ruling. A majority of this court are of opinion the motion was properly overruled. The judgment will be reversed and the cause remanded with directions to permit the defendants to plead to the merits of the action.

Reversed and remanded.

LUCINDA HULING, EXECUTRIX, ETC.,

v.

LIZZIE HULING.

Husband and Wife—Alienation of Affection—Husband—Advice as to Conduct of Married Person by Parent—Evidence—Instructions—Damages.

1. There can be no waiver of the rights of an insane defendant touching the introduction of the evidence of an incompetent witness.

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2. Such introduction is not cured by the fact that the testimony of the insane defendant was admitted without objection.

3. It is improper in an action by a wife against the parents of her husband for the recovery of damages alleged to have arisen through the alienation of his affection for her by reason of acts and advice on their part, to allow her to testify to conversations between herself and husband touching their living together and the attitude of his parents toward them.

4. A parent may in good faith and from worthy motives, in a moderate, temperate and careful manner, advise his son as to his domestic affairs without incurring liability if the same influences a separation between son and wife.

5. An instruction in behalf of the plaintiff in such case ignoring the relation of father and son and the question of good faith, is bad.

[Opinion filed November 23, 1889.]

APPEAL from the Circuit Court of McLean County; the
HON. OWEN T. REEVES, Judge, presiding.

MR. JOHN T. LILLARD, for appellant.

MR. FRANK R. HENDERSON, for appellee.

WALL, J. This was an action on the case by the appellee against Nathaniel Huling and Lucinda Huling, his wife. The declaration alleged that the defendants, conspiring together, did alienate the affection of John Huling, husband of the plaintiff, and thereby induced him to abandon and desert her. After the suit was begun, Nathaniel Huling was adjudged insane, and upon the trial Lucinda Huling, who had been appointed his conservator, represented and defended for him. When the plaintiff's testimony was closed the suit was dismissed as to Lucinda Huling. The jury found the issue for the plaintiff, and assessed her damages at \$1,250, upon which, after denying a motion for new trial, the court rendered judgment. Since the trial the defendant, Nathaniel Huling, died, and this appeal is prosecuted by Lucinda Huling, as his executrix.

Various errors are assigned, but we shall notice such only as seem to be most important. It appears from the evidence that the plaintiff, who had been for some time employed as a

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domestic in the family of the defendants, became unduly intimate with the said John, who was also a member of the family; that she and John were secretly married under circumstances showing that he was quite reluctant to take the step, and that he immediately left her and never sustained conjugal relations with her. A child was born to her about seven months after the marriage, and, more than two years after the marriage, this suit was brought. At the time of the marriage the plaintiff was about nineteen years of age, and John was over twenty-one years of age. At the trial the plaintiff was a witness in her own behalf, and was permitted to testify as to the declaration of the defendant, Nathaniel Huling. The plaintiff was competent as against the defendant, Lucinda Huling, but, as is conceded, she was not competent against the insane defendant, Nathaniel.

The court so stated in the presence of the jury, but counsel waived the objection as to the conversation the witness was then proceeding to detail. It was the duty of counsel and of the court to protect the insane defendant from the evidence of an incompetent witness. The conservator could not waive the rights of her ward in this respect. *Cartwright v. Wise*, 14 Ill. 417; *Rhoads v. Rhoads*, 43 Ill. 239; *Stark v. Brown*, 101 Ill. 395; *Fietsam v. Kropp*, 6 Ill. App. 144. Many other cases illustrating the principle involved might be recited but it is unnecessary.

The effect of this testimony was hurtful, nor was it counteracted by the evidence of the insane defendant who was permitted to testify, apparently without objection. He was incompetent because *non compos mentis* (1 Greenleaf on Ev. Sec. 365), and whatever he might say would have little or no weight with the jury as against the testimony of adverse witnesses who were sane. It is also objected that the plaintiff was permitted to detail the conversations she had with her husband, as to their purpose of living together and as to the opposition of his parents to the marriage. This was manifestly not competent because it was purely hearsay and was highly calculated to prejudice the rights of the defendants. *White v. Russ*, 47 Mich. 172; *Preston v. Bowers*, 13

O. St. 1. Other objections to the testimony of the plaintiff need not be discussed as upon another trial they can be obviated by excluding the witness altogether. The instructions given for the defendant advised the jury that a parent has a right in a moderate, intelligent and careful manner to advise a son as to his domestic affairs, and even as to living with his wife, and that if such counsel and advice be given in good faith and from worthy motives, the wife has no cause of complaint, even though such advice may contribute in some degree to the result of causing a separation. The distinction between the case of a stranger and that of a parent has been frequently recognized and it is no doubt well settled that a parent may, when acting in good faith, give his advice on this important subject without incurring liability. *Hutchison v. Peck*, 5 Johns. 195; *Smith v. Lyke*, 13 Hun, 204; *Payne v. Williams*, 4 Baxter, 583. *Schouler's Domestic Relations*, Sec. 41; 2 *Hilliard on Torts*, 510.

It is suggested by counsel for appellee that in all the cases where this distinction is stated, the action was by the husband for alienating the affection of the wife. Probably this is due to the fact that the action for such an injury was rarely, if ever, brought by the wife.

Whatever may have been the right of the wife in this regard at common law there is no doubt that under the legislation of this State she may maintain the action—*Bassett v. Bassett*, 20 Ill. App. 543; and there seems to be no sound reason why the parent might not in good faith, and from proper motives, render his advice to a son as well as to a daughter. True, such advice might be more appropriate and needful and more potent in the case of the daughter than in the case of a son, but this would be a difference in degree only and not in principle. We must hold, therefore, that the instruction referred to was properly given on behalf of the defendant.

Turning now to the instructions given for plaintiff it will be found that they ignore the relation of the defendant to the husband, and that they authorized the jury to find the defendant guilty although he may have acted in the utmost good

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faith and moderation. Notably is this so in the fourth, where it was said that "if the defendant did in any way or manner, or by any means, influence" the husband to abandon the wife he would be liable, and that it was "immaterial in this case whether there may have been other facts or circumstances contributing to cause such wrongful desertion."

The instructions as a whole were inconsistent and contradictory, and in a case like this where, on the proof, there is, to say the least, no little doubt as to the right of recovery, it is important that the law should be given with such accuracy as to make it clear that it was properly understood by the jury.

For the reasons indicated the judgment will be reversed and the cause remanded.

Reversed and remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—DECEMBER TERM, 1888.

JAMES P. RIELY

V.

R. T. BARTON.

[FOUR OTHER CASES.]

Attachment—Insufficient Abstract—Jurisdiction—Service by Publication—Damages—Exceptions.

1. A certificate setting forth service by publication, should show that it was made by the publisher of the paper in which it appeared.
2. A certificate imperfect in this respect may be cured by other proof of publication in the paper in question.
3. The remedy, in case of dissatisfaction with an assessment of damages on default, is a motion to correct the same.
4. This court will not review the assessment of damages on a default, in the absence of a bill of exceptions setting forth all the evidence heard.
5. The presumptions are always in favor of the correctness of the judgments of courts of common law having general jurisdiction.

[Opinion filed May 25, 1889.]

IN ERROR to the Circuit Court of Kankakee County; the
Hon. ALFRED SAMPLE, Judge, presiding.

Mr. DANIEL H. PADDOCK, for plaintiff in error.

(524)

Mr. G. S. ELDRIDGE, for defendant in error.

The criticism upon the proof of publication has no force whatever. The law does not specifically define how publication may be proved. It merely *authorizes* a certificate of publication to be made by the publisher when *no other* mode is observed. Starr & C. R. S., p. 1674, Sec. 1.

The statute simply provides that the certificate *shall* be sufficient evidence of publication, but does not exclude any other legitimate proof of publication. In Barnett v. Wolf, 70 Ill., p. 79, the Supreme Court said: "The statute has, however, provided that where the service is by publication, a proper certificate of the printer shall be sufficient evidence of service to confer jurisdiction; * * * but the statute *has not* declared that this shall be the *only* means of proving the publication."

This, of course, may be established by affidavit.

In Haywood v. Collins, 60 Ill. 331, cited by appellant, the *certificate* was held void because it did not appear that the *party making it* was the *publisher*, and such also was the case in Haywood v. McCrory, 33 Ill. 459.

Of course, these unsupported *certificates* afforded no legitimate proof that the notice had been duly published; but in the pending cases the *actual publication* of the notices, as *required by law*, was proved by the positive sworn statements contained in the affidavits made by Lake, which shows a strict compliance with the statute in the several cases. There can be no question, therefore, but that the evidence of publication was abundantly sufficient to give the court jurisdiction, and the record shows that proof of publication was made and approved by the court in each case.

If the defendants were dissatisfied with the assessment of damages, their remedy was to move to vacate the assessment. Motesinger v. Colman, 16 Ill. 71; R. R. Co. v. Ward, 16 Ill. 522; Myers v. Phillips, 72 Ill. 460; McKenzie v. Penfield, 87 Ill. 38; Gradle v. Hoffman, 105 Ill. 147.

C. B. SMITH, J. These five cases are brought here on writ of error to Kankakee county, and are all so nearly alike in the questions involved that they may be considered

together. They all involved the validity of certain attachment proceedings begun in each of the cases in Kankakee county, and prosecuted to judgment against each of several plaintiffs in error.

The abstract of the record in each case is so brief and imperfect that we get a very imperfect knowledge of the proceedings had in the court below. Indeed, the abstracts are little more than an index to the record. We might be well justified in affirming all these judgments, for want of such an abstract as the rules of the court require; but we have waived that right and examined the questions raised, and passed upon the merits.

Only two questions are raised on these records by plaintiffs in error. First, they deny that the record shows affirmatively (as it must) that the court has jurisdiction of the plaintiffs in error; and, second, they insist the court erred in the assessment of damages. Upon both of these assignments of error the cases are all substantially alike. It is insisted that the certificate of publication of C. A. Lake, the publisher, of notice to the defendant in attachments, was not sufficient to give the court jurisdiction of the parties. The only objection to this certificate is that Lake does not describe himself as publisher of the paper in which the notice was published—simply signing himself as “C. A. Lake,” without designating himself as publisher, or as having anything to do with the paper.

In all other respects the certificate seems to be formal and in conformity to the requirements of the statute. If this certificate was the only evidence in the record of any proof of notice to the defendants in the attachment proceedings, it would be insufficient and could not confer jurisdiction on the court. *Haywood v. McCrory*, 33 Ill. 459; *Haywood v. Collins*, 60 Ill. 331.

But in addition to the certificate, the judgment of the court, set out in the record, recites that the court heard proof, and the court finds that the notice was published for the time and in the manner required by law. The following is the finding of the court upon that subject in each of the cases. “And now the said plaintiff makes due and satisfactory proof to the

Riely v. Barton.

court of the due publication of the notice of the pendency of this suit as to said defendant. And it further appearing to the court that said notice was published for the length of time and in the manner provided by law, and was of sufficient form to notify said defendant of the pendency of this suit at this term of court, and the time and place where this court is holden, and that unless she appeared and filed her plea herein as required by the rules of this court to do, a judgment would be entered against her and in favor of said plaintiff. And now the clerk of this court also comes and files his certificate of the mailing of said notice to the postoffice address of said defendant, as set forth in the affidavit of non-residence herein." This finding of the court recited in the judgment removes the objection urged, for we are bound to presume that the court satisfied itself that Mr. Lake was the publisher of the paper. This it might do by a separate affidavit or certificate, or it might hear oral testimony on the subject. *Pierce v. Carleton*, 12 Ill. 358.

The publication of notice to the defendant in each of the cases being fully proven to the court, as required by law, the court then obtained jurisdiction of the person of the defendants, and levying the writ on the property gave the court jurisdiction of that also. Objection is also made to the bonds in each case. While some of the bonds were informal and seem to be wanting in technical accuracy, still we think they were all substantially good. The second objection urged is that the court erred in the assessment of damages. The plaintiffs in error are not in a position to raise that question. In all the cases a special appearance was entered by the respective defendants in the attachment, and the appearance limited for the purpose of moving to quash the attachment writ and to dismiss the suit. The court overruled this motion in all the cases, and the defendants, abiding by this motion, declined to plead to the writ or the action and suffered defaults in each case, and the court thereupon assessed the damages as follows: "And now the court hears the evidence, the arguments of counsel, and being fully advised in the premises, finds the issues for the plaintiff, and assesses said plaintiff's damages at

§—— and orders judgment for said damages. It is therefore considered by the court that said plaintiff have and recover of said defendant the said sum of §——, together with his costs of suit herein, and that said plaintiff have special execution against the property attached herein for said sum of §—— and costs," the blanks above being filled in each case with the amount found due.

The default admitted the amount claimed in the affidavits for the attachment, and it was a matter of no importance whether there was an affidavit of merits or not, aside from the attachment affidavit. The court might accept the amount stated in the affidavit or might require additional proof of the amount due. The record recites that the court did hear evidence upon the question. That is all the law requires. If the defendants below were not satisfied with this assessment, it was their privilege and duty to move the court for its correction. *Motsinger v. Colman*, 16 Ill. 71; *R. R. Co. v. Ward*, 16 Ill. 522; *Gradle v. Hoffman*, 105 Ill. 147. Before this court can review the assessment of damages on a default, there must be a bill of exceptions showing all the evidence heard by the court on the hearing.

It is urged that the record in one of the cases shows that the court allowed compound interest on a record of a judgment from Virginia. There is no proof in the record to show that this was erroneous. There is nothing to show that by the laws of Virginia compound interest may not be allowed.

The presumption is always in favor of the correctness of the judgment of courts of common law of general jurisdiction; and in the absence of proof showing the assessment of damages erroneous, we must presume it was correct. There are some other minor objections made by plaintiffs in error, but none of which we think has any merit. Finding no substantial error in any of the cases, the judgment in each and all of them is affirmed.

Judgment affirmed.

MATTHEW KINGMAN

v.

PATRICK HARMON, GUARDIAN, ETC.

Mortgages—Foreclosure—Interests of Minor Heirs—Estoppel—Wills.

1. In proceedings to foreclose a mortgage executed under the approval of the County Court, conveying the property of minor heirs, they can question its validity.

2. The purchaser of incumbered lands is not estopped from denying the validity of a mortgage thereon merely because he prepared the petition to the County Court to procure leave to mortgage, and advised the mortgagee, though not as his attorney, that the loan contemplated would be a safe one.

3. In the case presented, the interest of the widow in the purchase money of the premises in question, due the estate of her deceased son, can not be reached in the foreclosure proceedings, upon the mortgages being declared void.

[Opinion filed May 25, 1889.]

APPEAL from the Circuit Court of Peoria County; the Hon. T. W. SHAW, Judge, presiding.

The appellant, who was complainant in the court below, filed his bill in the Circuit Court April 21, 1886, against appellees, Patrick Harmon, guardian of William and Mary Boylon, minor heirs of William Boylon, deceased, and also against the said minors in person, and against Maria Boylon (formerly Webster), the widow of William Boylon, deceased, and Josiah Cratty, to foreclose two certain mortgages given by said Harmon, as guardian of said minors, and by said widow in her own right. The mortgages were the usual mortgages given to secure notes given for borrowed money. The first, dated February 26, 1880, was given to secure a note executed by said guardian for \$2,000, payable to appellant, due in three years, with eight per cent. interest per annum, payable annually. The second mortgage, with like parties and given to secure the sum of \$925, dated March 24, 1881, was due Feb-

ruary 26, 1883, with same interest, payable annually. Each mortgage debt was secured by said mortgages respectively on a certain quarter section of land situate in said Peoria county, owned by said William Boylon at the time of his death. The parties at present interested in the subject-matter of this suit and at the time of the decree in the County Court, were the complainant, Matthew Kingman, and the respondent, Josiah Cratty, by virtue of a warranty deed to the mortgaged land from William and Mary Boylon and said Maria Boylon, of date July 22, 1885, who claims to be the owner, and respondents, Mary Boylon (now Hays) and Maria Boylon (now Ryan) and William Boylon, who claim that said mortgages are void for the reasons set up in their various answers. Maria Boylon, *alias* Webster, *alias* Ryan, who executed the mortgage, was at the time interested in it, first as widow of William Boylon, deceased, and also as the owner of a one-sixth interest in the land in fee, as the heir of her son William Boylon, deceased, who died intestate and without issue in the year 1873, and subsequently to the death of his father, William Boylon, who died the latter part of December, 1866.

The record shows that Maria Boylon, the widow, refused to qualify as executrix, and requested, in writing, the County Court to appoint Charles Boylon sole executor of the will of William Boylon, deceased, which was done, and he acted as such from January, 1867, to January, 1869. Patrick Boylon was appointed guardian of Charles, William and Mary Boylon in January, 1868, and qualified and acted as such guardian until August 3, 1871, when he resigned and Patrick Harmon was appointed guardian of said minors and acted as such until March 3, 1886. The following are the provisions of the will of William Boylon, deceased:

"First. It is my will that all my just debts be paid. After paying my just debts, it is my will that, after reserving a sufficiency for my wife and children, the proceeds of the remainder of my personal property be placed at interest for the maintenance of my wife and children.

"Second. It is my will that all my real estate, consisting of the northeast $\frac{1}{4}$ of section 36, township 11 north, range

8. east of the 4th principal meridian, also twenty acres of timber land in said township, be reserved for my children and be divided equally among them when the youngest attains the age of twenty-one (21) years, subject to my wife's dower; and that the proceeds of said property, until that time, be placed at the disposal of the executors, to be used by them for the support of my wife and the support and education of my children; any surplus arising from the above to be used for the benefit of the heirs."

At the time of the decree in the court below the boy named William Boylon was deceased. The answers set up and question the right of Patrick Harmon, guardian, to mortgage the premises. 1st. That the will prohibited it. 2d. The money was not needed or used for the support and maintenance of the minors, but, on the contrary, was wasted in loaning it out to various persons, including John C. Yates, the county judge, and in buying real estate (lot in Peoria) and building a house on it, and in furnishing Maria Boylon large amounts of money to be used by her in the saloon and grocery business, and in payment of lawyer's fees and court costs in needless litigation growing out of the mismanagement of the estate—all of which appellant could have known if he had used due care—and various other charges and specifications showing there was no necessity of borrowing the money represented by the mortgages. Answer further avers that the application to borrow the money was not approved by the County Court, and that the mortgages, especially the last one, was not approved by the County Court, but by Judge Yates personally.

It appears that Mary Hays, William Boylon, by his conservator, Josiah Cratty, and Josiah Cratty, filed a cross-bill asking to have the mortgages removed as a cloud on the title.

Upon a hearing in the Circuit Court, the court found that the moneys loaned by the complainant, Kingman, to respondent, Patrick Harmon, guardian of Mary Boylon (now Hays), and William Boylon, who appears by conservator and guardian *ad litem* in this case, were not, nor any part of said loans for which the two mortgages sought to be foreclosed under the original bill herein were given, a proper charge against the

estate of said Mary Boylin or William Boylin aforesaid; and the said mortgages are not valid as against the title of said Mary Boylon, now Hays, or William Boylon in and to said real estate, and the said bill as to them was dismissed for want of equity; and the court found that as to Roswell Bills and Josiah Cratty there was no equity, except as far as Cratty may have acquired title of defendant Maria Boylon, *alias* Webster, *alias* Ryan, in said real estate.

The court held the one-sixth interest of Maria Boylon subject to the mortgages and decreed foreclosure as to it, and he'd her personally liable for the last note which she personally signed; and as to the interest in said land acquired by Josiah Cratty from Mary Hays and William Boylon the mortgage was void.

Messrs. WILLIAM S. KELLOGG and JAMES A. CAMERON, for appellant.

It would appear that if the prior proceedings, under which leave to mortgage was obtained and the credit given, the money loaned and the mortgage executed, were in conformity with the statute, the court had jurisdiction and the mortgage itself could not be questioned on the ground that the court erred in the exercise of its legal discretion by entering the order for leave to the guardian to mortgage. The order to mortgage gave a vitality to the mortgage of which it could not be deprived.

This position is in harmony with the decision of Reid v. Morton, 119 Ill. 130, which holds also that the power of authorizing a guardian to sell his ward's real estate is not a judicial power but is a mere ministerial power, "which might have been given to the selectmen of each town, or the clerks or registers of the counties, it being a mere ministerial act." Yet the court say (119 Ill., p. 131):

"Irregularities and errors in the course of proceeding are insisted upon as invalidating the guardian's sale. It is certainly the well settled general rule, that when a court has jurisdiction of the subject-matter and of the parties to the litigation its judgments and decrees will be held valid when

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questioned collaterally. And this court has many times applied the rule in the very case of this special statutory and extraordinary proceeding of a guardian's sale, which this is so much dwelt upon as being. *Young v. Lorain*, 11 Ill. 624; *Mulford v. Stalzenback*, 46 Ill. 303; *Spring v. Kane*, 86 Ill. 580.

"In *Mulford v. Stalzenback* it is said, in reference to such a sale, that it was sufficient for the purchaser to see there was an order of court for the sale of the land and made by a court having jurisdiction to make that order. The statute under which the proceeding was had, Sec. 10, Chap. 47 of Revised Statutes of 1845, empowered the court to order a sale of the real estate of the ward on application of the guardian by petition in writing, stating the facts, requiring publication of notice in a newspaper three weeks before the sitting of the court. There was here such a petition and publication of notice. * * * This gave the court jurisdiction."

In the case at bar, the court had jurisdiction by the filing of the petition for leave to mortgage. It had from time to time approved of the several reports of the guardian, and such approvals were adjudications, so far as his accounts were concerned, upon which the appellant had a right to rely. If, after having loaned his money on the strength of these adjudications and the order of the County Court made in a matter where it had undoubted jurisdiction, appellant is to be dismissed from a court of chancery without any redress, the statutory provision of a guardian's mortgage may well be considered a deception and a snare, to attempt to avail of which ought to be prohibited by penalties as severe as those imposed against the confidence game.

Believing that he had a right to rely upon the exercise of the discretion with which the law had invested the County Court, of saying when and to what extent the necessities of the wards rendered it proper that an order be entered granting the guardian leave to mortgage their real estate; and believing, also, that money invested on the faith of that order will be protected in a court of equity, on being told by the decree of the court below that his security is worthless, and that the

same should be canceled as a cloud on the title of the defendant, Josiah Cratty, who planned and encouraged and advised and devised the making and taking of the same, and individually received hundreds of dollars of the money so borrowed, the appellant prosecutes this appeal and respectfully asks that said decree be reversed.

Messrs. SHEEN & LOVETT and M. C. QUINN, for appellees.

"It is a general rule of the common law that the expenses of the infant or the ward shall be kept within the income or the produce of his estate, although the court of chancery or other proper court has frequently, in cases of strong necessity, ordered a portion of the principal to be appropriated in that way; but in doing this they have always proceeded with great caution and have only done it in urgent cases. The inducements for guardians to invent for their wards artificial wants that they may reap an incidental benefit in the expenditure of their estate, has admonished the courts to guard with a jealous eye the estates of infants who are unable to protect themselves. Without this, the ward would too often become the victim of the guardian, and the most ample estate would, during a protracted minority, become dissipated more to his advantage than that of his ward. Courts of equity exercise a strict supervision over the expenditures of guardians, requiring the application of the income of the estate to the support and education of the ward; but they seldom sanction the use of the principal, even for these purposes, unless a very clear case of necessity is made out to the court so ordering. Much stricter still is the rule when a guardian breaks in upon the principal without first obtaining an order of a proper court for him to do so." *Davis v. Harkness*, 1 Gilm. 173; *Cummings v. Cummings*, 15 Ill. 33; *Bond v. Lockwood*, 33 Ill. 212; *Eyre v. Countess of Shaftsbury*, Vol. 2, pt. 2, *White & Tudor's Equity Cases*, p. 164.

While the mortgages are approved by John C. Yates, county judge, they are not approved by the County Court, as they should be to be valid. *Hughes et al. v. People*, 111 Ill. 457; *Field v. Herrick*, 5 Ill. App. 54.

The County Court is a court of record, but there is no record of the approval of the mortgages. The entry upon one of them, and about the other, is not a record, and being signed by John C. Yates as county judge, is not the act of the court. *McIntyre v. People*, 103 Ill. 148; *McFarland v. McFarland*, 4 Ill. App. 157.

We concede that if a sufficient petition is filed, is acted upon by the court, and a decree in conformity with the petition is rendered, and a mortgage is made in conformity with the decree, the mortgage would be a mortgage, but without these prerequisites it would not; but if a mortgage is made by a guardian, when being foreclosed it must appear that complainant, who asks equity, is doing equity. *Kingsbury v. Sperry*, 119 Ill. 280.

LACEY, P. J. There are two questions presented to us for consideration in this case, one of law and one of fact.

The first is, can the heirs of William Boylon, deceased, who were minors at the time the mortgages were executed, be heard, in this proceeding to foreclose, in a collateral way, to dispute the validity of the mortgages in question, after having been executed by leave of the County Court? It is contended on the part of the complainant that neither they nor their grantee, Cratty, can dispute the validity of the mortgages for the supposed reason that the question is *res adjudicata*.

We are of opinion that this point of law is not well taken. On the contrary, we must hold that the approval of the County Court of the giving of the mortgages does not have the effect to make the mortgages absolutely valid and binding as against the heirs. We are also of the opinion that the heirs may question the right to execute the mortgages in this proceeding to foreclose, and are not estopped to do so. The approval of the loans by the judge under our statute was ministerial only, and in no way bound the heirs. The statute requires that the heirs be made parties to the proceeding to foreclose, and it is in that proceeding for the first time that they have an opportunity to contest the validity of the mort-

gage. *Kingsbury v. Sperry*, 119 Ill. 280, we think fully settles this principle. It is said in that case by the court that "The question is treated in argument as if an order giving leave to a guardian to mortgage, and an order or decree authorizing him to sell the land of his ward are essentially the same in principle. This is plainly a misapprehension. By the sale and confirmation the title of the ward passed absolutely to the purchaser. Before this can be effected the court is required to hear evidence as to the existence of certain facts (see R. S. 1874, Secs. 28, 29, 30, *et seq.*, Chap. 64). We have seen in the case of mortgaging no title passes until the decree of foreclosure, sale and confirmation thereafter. No fact is to be adjudicated before making the order. The power is given to the guardian simply, by leave of the court, to perform the ministerial act of borrowing money and executing mortgage. It might have been vested in the guardian absolutely, without consulting the court, or might have been vested in some other individual. *Coo'ey on Con. Lim.*, 98, 99, *et seq.* Judicial power is only invoked when a foreclosure is sought, and then we have seen the ward has all the rights that he claims that he now has the right to assert." Thus it will be seen that the heir has a right to test the validity of the mortgage when it is sought to be foreclosed. See *Kircher v. Beecher*, 41 Ill. 179.

We will not go over and recite the evidence concerning the administration of this estate by the guardian, as it would consume much unnecessary time, but will content ourselves in stating generally our conclusions. The mortgaged property was worth about \$8,000, and was farm land worth from \$400 to \$600 per year rental, and there came to the hands of Harmon the sum of \$2,850 from the former guardian, and this could have been readily loaned for eight per cent. interest per annum. Inside the nine years all this money was spent, and all the income also spent, and the property mortgaged inside of two years for nearly \$3,000. The guardian allowed the county judge and Mrs. Boylon to spend the money as they pleased. No order was ever asked for from the County Court to make expenditures for the wards, but the guardian pro-

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ceeded to use the money promiscuously for the widow for any purpose she desired. He built a house costing over \$1,300 with the money, which the widow occupied, and also furnished large supplies to Mrs. Boylon to carry on business. No account was kept with Mrs. Boylon and the wards separately. The purpose of borrowing the money was illegitimate and fraudulent. We have no doubt that the guardian, if he had acted with prudence, could have supplied the wards with all the assistance necessary, as also Mrs. Boylon, in accordance with the provisions of the will, out of the income, without at all, or at least very slightly, trenching on the estate.

The action of the guardian was reckless in the extreme, and appellant, if he had examined appellee's (Harmon's) official reports to the County Court, would have discovered it. He had no right to borrow money to invest with the widow, and to pay her debts to lawyers and others, as was done, or to invest in real estate. The guardian, in 1874 and 1875, built a house on a lot, the title of which was in his own name, which he held for the heirs and widow. All this was done without any authority of law, and was not sold till long after this money was borrowed, between April and July 1, 1885. This money should have been used before a resort to borrowing was had. It was illegal to borrow money to pay for supplies for Mrs. Boylon's saloon and boarding house, and an order should have been obtained from the County Court authorizing disbursements before the money was borrowed. Nothing of the kind was done. *Bond v. Lockwood*, 33 Ill. 212. The \$2,000 was used in paying Cratty's attorney's fee of \$400, and for his own debt for supplies furnished Mrs. Boylon, \$525, and other like things.

The position assumed by appellant's counsel, that Cratty is estopped from denying the validity of the mortgage because he prepared the petition to the County Court, to procure leave to mortgage, and advised appellant that the guardian had a right to execute the mortgage, is not well taken.

Cratty was not, at the time, the attorney of appellant, and there is no evidence that he had any fraudulent intent to mislead the appellant. In addition, he was not, at the time, the

owner of the land. If any estoppel existed as to Cratty, it must have become operative at the time, otherwise, if he did any wrong by the advice given, he would have been simply liable in an action on the case for deceit, and he, by such advice, could not affect the title of the minors. As far as Cratty's action was concerned, the title of the minors was unclouded, and to allow it to become clouded upon a sale to Cratty would, in substance, deprive them of the right to sell to him, or embarrass the sale, which would be an injury to them, who were blameless. This the law would not allow. If the advice of Cratty amounted to anything, it was simply a liability to appellant and could have no place in this investigation. Again, the amount of appellant's mortgages are held in trust by Cratty for the interest of Mary Hays and the administrator of William Boylon, deceased, the other minor, and if he is estopped Cratty would not be the one to suffer.

It is also insisted that whatever money the widow will inherit of the money coming to William Boylon, deceased, in case the mortgages are defeated, should be allowed appellant. This position is not tenable. The interest of William in the purchase money due from Cratty goes to his administrator and not to his heirs, it being personal.

The widow's liability on the note she signed, and her warranty contained in the mortgages, if any, can not be satisfied by attaching her claim as heir against the administrator of her son William, deceased. Her personal liability on her covenants in no way creates a lien in appellant's favor in her interest as heir of her son's personal estate. It is not attachable in this proceeding. We hold that, under the evidence, the conveyance from William to Cratty of his interest in the land was valid, and no proof shows that he was not competent to execute the deed.

The appellees make the point, in addition to the ones noticed above, that in accordance with the provisions of the will of William Boylon, deceased, the guardian could not mortgage the land, as the land was not to come into possession of the heirs until they were twenty-one years of age. But from what we have above said it will appear that it is not necessary to pass upon that point.

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Seeing no error in the record, the decree of the court below is affirmed.

Decree affirmed.

C. B. SMITH, J. I do not concur in the judgment of the majority of the court in this case. I hold that the proceedings in the County Court were had in strict conformity with the statute authorizing the guardian to borrow the money for the use of his wards, and the approval of the court of the loan before it was made is a full and complete protection to Kingman, who parted with his money on the strength of the order of the court and the advice of Cratty, who procured the order for Harmon through the County Court. The record in this case shows that Harmon, the guardian, complied strictly and in every respect with the requirement of the statute. The statute confers power on guardians to incumber the lands of their wards by mortgages (Secs. 24 and 25, Chap. 64, p. 1244, Starr & C., Ill. Stat), but that before such guardian can borrow money and mortgage the land of his wards the guardian shall first petition the County Court for an order authorizing such mortgage to be made. This was done, upon a sufficient petition, and the application was heard by the County Court, and after a full hearing the court made its order authorizing the guardian to make this loan. The court found all the facts necessary to be found to justify the judgment and the order of the court. The court had jurisdiction of the person and the subject-matter.

I am, therefore, of opinion that Kingman had a right to place implicit confidence in this record made by the County Court. He was under no obligations to determine for himself whether the loan was necessary to be made for the benefit of the wards. Nor was he bound to see to the application of the money by the guardian or County Court. He had no power or control over it. There is no proof in the record that he knew of any misconduct or misappropriation of the wards' money by the guardian, or of any conspiracy between the County Court and Harmon to waste the estate of these children. It may be conceded, and is undoubtedly true, that these

wards were most grievously robbed and plundered of their estate by the guardian, the county judge and their mother ; but appellant had no knowledge nor any part in this waste and misappropriation of the children's estate. He is an innocent party. So long as the statute allows guardians to mortgage the estate of their wards there must be some authority to determine when the necessity arises for such incumbrance ; but if minors are not bound by the action of such forum, and may come in twenty years, or any other time, after such mortgage is executed, after their necessities and infancy and witenesses have all disappeared, and defeat the mortgage by showing misconduct of the guardian, ignorance, or dishonesty, or both, of the court, and general waste of their estate by the guardian, and thus defeat the just claim of an honest mortgagee who loaned his money in good faith to the guardian on the strength of the order of the court, then, indeed, few men will be found who will advance their money on any such security. The judgment bound the minors or wards in this case. *Mulford v. Stalzenback*, 46 Ill. 303; *Spring v. Kane*, 66 Ill. 580.

I hold, also, that Cratty's conduct in this whole transaction, from beginning to end, estops him from denying the validity of these mortgages. The proof shows that it was through his advice and active affirmative agency and conduct that Kingman was induced to make this loan. Kingman was assured by him that the order authorizing the loan was valid and legal and that it was a good and safe loan. Through this advice Kingman loaned his money for the use and benefit of those wards, and yet Cratty, well knowing what the money was loaned for, receives \$450 of the money for fees for legal services, which were not rendered for these children. He knew he had no right to that money out of that fund, and that the guardian had no right to pay it to him, nor to any other person for his use. After thus inducing Kingman to loan his money on the strength of what he then said was a legal order, and after himself receiving a large sum of the money, he now assumes a different attitude directly inconsistent with his former position. He has himself become a purchaser

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of the mortgaged premises, and without having paid the grantors for the same the amount represented by the mortgages, he now is insisting that the order of the court is not valid, and that it affords Kingman no protection. His position now is hostile and directly antagonistic to the one he occupied when he advised Kingman the order of the court was valid and the loan a safe one. He now insists that he shall be permitted to further profit by this transaction in the sum of \$3,000 and hold the land discharged of the mortgages.

I hold that under the plainest rules of equity and fair dealing he ought to be estopped from assuming a different attitude from that he occupied when he induced Kingman to part with his money.

For the reasons above, very briefly given, I hold that the decree of the Circuit Court is erroneous and unjust in the extreme and ought to be reversed.

WILLIS S. HUBBARD, ADMINISTRATOR,

v.

GUY STAPP, RECEIVER, ETC.

Life Insurance—Assignment of Policy—Specific Performance—Vested Interest—Embezzled Funds—Lien.

22 541
51 25

1. A person named as the beneficiary in a life insurance policy obtains a vested interest therein, which can not be affected by any subsequent act of the assured.

2. A life insurance policy can not be assigned without the consent of the company.

3. Where the assured has paid the premiums on a policy in favor of a third person with funds embezzled from another, such payments are a lien on the policy; and if the one from whom such funds have been embezzled pays subsequent premiums, the same, with interest, also constitute a lien on the policy.

4. The decree can not find more than is charged in the bill.

5. In the absence of a bill of exceptions and certificate of evidence, the only question is whether the findings of the court below are sufficient to sustain the decree.

[Opinion filed June 4, 1889.]

IN ERROR to the Circuit Court of Warren County; the Hon. JOHN J. GLENN, Judge, presiding.

What we presume may be regarded as the material allegations of the bill in this case are, that on the 9th day of April, 1884, B. T. O. Hubbard was the owner and in the possession of five several policies of insurance: three in a New England company, numbered 62,034, 65,584, 66,426, and dated respectively, July 21, 1879, July 30, 1881, and December 31, 1881; one in a New York and one in a New Jersey company. That number 65,584 was made payable to Hubbard at the end of fifteen years, or in the case of his death before that date, then to his executors and administrators for the use and benefit of his wife, Fannie P., and of his son, Willis S. Hubbard, if they should survive him; that number 66,426 was made payable to him at the end of twenty years, or in case of his death before that date, then to his executors or administrators for the benefit of his said wife and son, if they should survive him; that Hubbard was, on said 9th day of April, found to be largely indebted to the bank for money embezzled; that to reimburse the bank in part for the money taken, he agreed to assign the several policies of insurance to the bank, and in pursuance of such agreement left the policies in possession of the bank; that he afterward refused to assign according to his agreement, but made a pretended transfer of the same to defendants Fannie P. and Willis S. Hubbard; and charges that a large amount of the premiums paid by B. T. O. Hubbard on the policies were paid in the money and funds of the bank embezzled by him; that none of the premiums were paid by Fannie P. or Willis S. Hubbard, but were paid by said B. T. O. Hubbard, either out of his own funds or out of the funds of the bank, and the bill prays the specific performance of the agreement.

The bill was filed April 24, 1885, and at the appearance term a demurrer by all the defendants was filed to the bill, which was afterwards overruled (see record, pages seven and eight); and defendants thereupon answered, thereby, as is claimed, waiving all technical objections to the bill and admitting its substantial equities.

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The answer of the defendants, Fannie P. and Willis S. Hubbard, was joint, and denies most of the material allegations of the bill. Admits that B. T. O. Hubbard was, at the time alleged, the owner of policy number 62,034 and of the New Jersey policy, but denies that he was the owner of policies number 65,584 and 66,426 and the New York policy, and avers that they were the owners of these policies, and, avers also, that B. T. O. Hubbard had no right or authority to sell, assign or transfer any of the last named policies "without the consent of these defendants."

A replication was filed to the answer, upon which there was a hearing and decree in favor of the complainants below for the three first named policies, numbered 62,034, 65,584, and 66,426. The other two policies, as stated by counsel for plaintiffs in error, were delivered up and are not in dispute. Nor do we understand that any claim is made on account of the first named policy, numbered 62,034, the answer having conceded that that policy was the property of B. T. O. Hubbard when the contract of assignment was made, and the argument of plaintiffs making no claim thereto. The controversy, then, only relates to the remaining two policies numbered 65,584, dated July 30, 1881, and 66,426, dated December 31, 1881. The contention is that these policies having been made payable to the use and benefit of his wife and son, if he should die within the times limited in the policies and they should survive him, they had a vested interest in the policies such as would prevent their transfer without their consent.

There is no bill of exceptions nor certificate of evidence.

The only question, then, properly arising here is, are the findings of the court below, as stated in the decree, sufficient to sustain the decree?

The decree finds every material fact as stated in the bill. That Hubbard was, on the 9th day of April, 1884, indebted to the bank as set forth in the bill, and was at that time the owner and possessed of the insurance policies described; that in consideration of his indebtedness he agreed to assign them to the bank for its own use and benefit; that in pursuance of such

agreement the policies were delivered to the bank, in whose possession and in that of its receiver they remained from that time; that none of the premiums were paid by plaintiffs in error, but were all paid by B. T. O. Hubbard out of the funds of the bank embezzled by B. T. O. Hubbard, and that the pretended assignment of the policies to plaintiffs in error was with notice of and in fraud of the rights of the bank, and that complainant below was duly appointed receiver of the bank.

Upon these findings the decree was based.

Messrs. PORTER & MACDILL, for plaintiffs in error.

Messrs. KIRKPATRICK & ALEXANDER and R. J. GRIER, for defendant in error.

LACEY, P. J. Various questions are raised in this case by appellant, who cites, in support of his claim that the interest of the wife and son of B. T. O. Hubbard could not be transferred to the bank in the manner claimed, the following cases: The Central Bank of Washington City, etc., v. Hume, U. S. Supreme Court, by Chief Justice Fuller, filed November 1, 1888 (128 U. S.). Also, Glanz v. Gloeckler, 104 Ill. 573; S. C., 10 Ill. App. 484. Other cases may be found bearing on the same point, as Johnson v. Van Epps, 110 Ill. 551; S. C., 14 Ill. App. 201.

The case above cited from the United States Supreme Court, and also of Glanz v. Gloeckler, both hold that where an insurance policy is taken by the assured on his own life, payable at his death to a third party, such party attains a vested interest in the policy.

And in Gould v. Emmerson, 99 Mass. 154, it will be seen that it makes no difference whether the policy is made directly payable to the beneficiary or not.

In Bliss on Life Ins., 2d Ed., p. 517, it is laid down as a rule as follows: "We apprehend the general rule to be that a policy, and the money to become due under it, belongs, the moment it is issued, to the person or persons named in it as

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the beneficiaries; and that there is no power in the person procuring the insurance, by any act of his, by deed or will, to transfer to any other person the interest of the person named. An irrevocable trust is created."

It may be contended that the authority of the above was misleading in making such statement by the examination of cases from such States where the statutes regulated the matter, and that the rule is not applicable to States where there is no statute law on the subject. In view of the decisions in *Otis v. Beckwith*, 49 Ill. 121, and *Glanz v. Gloeckler*, 104 Ill. 573, we can not believe that such claim can be set up in this State, either where the policy is made payable directly to the beneficiary or to the assured's administrator for his use. We can see but little distinction, and believe the author has stated the law correctly. We will notice the question further on.

The policies in question were made payable to himself at the end of fifteen years and twenty years, respectively; in case of his death before those dates, to his executors and administrators, for the use and benefit of his wife, Fannie P. Hubbard, and his son, Willis S. Hubbard, if they should survive him.

This was equivalent to a policy for the benefit of his wife and son, running fifteen and twenty years, respectively, in case of death within that time, and this limitation or contingency, as we conceive, can make no difference in the right to insure for the benefit of his wife and son. The policy was never changed by the insurance company to an absolute policy payable to Hubbard's administrators, but Hubbard agreed to transfer the policy absolutely for the benefit of the bank; and in that way the bank took it and got the agreement for the assignment. This could not be done except by the consent of the insurance company, if at all. The original contracts of insurance have never been changed. *Johnson v. Van Epps*, 14 Ill. App. 201. In *Glanz v. Gloeckler*, 104 Ill. 573, where the insurance in case of death was payable to the wife, it was held an interest vested in her that could not be changed except by her consent.

In *Otis v. Beckwith*, 49 Ill. 121, where the insured never parted with the possession of the policy of insurance, but on a

separate paper assigned it for the benefit of his three sons to a trustee, and the same was accepted by such trustee, it was held to be an irrevocable trust in favor of his sons. And it does not matter whether the *cestui que trust* occupies the position of volunteer or not. *Badgley v. Votrain*, 68 Ill. 25.

It is insisted that the bill charges and decree finds that the insured, Hubbard, was the owner at the time of this assignment of the policies in question. It is true he had an interest in the policies contingent on his living fifteen and twenty years, and this, taking all the allegations of the bill together, must be regarded as the real charge in the bill, *i. e.*, a special ownership, and the decree can find no more than charged in the bill. Especially is this so when it is nowhere charged that the insurance policies, set out in full in the bill with all their conditions, were assigned to the bank by consent of the wife and son. Where there is any ambiguity, the allegations of the bill must be taken more strongly against the pleader. The appellee insists that the bill charges and the decree finds that the premiums were paid by Hubbard out of money he embezzled from the bank, and hence, in equity, the bank is entitled to the benefit of the policies. It will be observed, however, in answer to this suggestion, that the bill does not proceed on this theory, or claim that they are entitled to the assignment of the policies on that ground, but upon an express contract with Hubbard to assign the policies in consideration of a large indebtedness due from Hubbard to the bank. Again, the bill does not charge that *all* the premiums were paid for out of moneys of the bank, but it says a *large portion* was so paid, or that Hubbard paid them out of his own funds, and the decree can not be broader than the charge. It is evident that this point was not relied on in the court below. And even if so, we can not concede that such fact, if a fact, would have the effect of giving appellee the right to the entire policies. The bank, however, if its money paid the premiums, would be entitled equitably to be reimbursed to such an amount and interest out of the proceeds of the policy. And if upon a retrial the evidence should show that such was the fact, it should be allowed such premiums and interest thereon

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out of the insurance money, together with the premiums, if any, since paid by it, with interest, as that would inure to appellee's benefit, since Hubbard has died within fifteen years.

We are of the opinion that the decree is erroneous, in that it orders the entire interest of Mrs. Hubbard and her son to be transferred to the bank by the assignment. The decree should only have ordered the interest of Hubbard, according to the terms of the policies, to be so transferred, which was contingent on the duration of his life for fifteen and twenty years. Now that he died within a period of fifteen years, his interest expires. For this error in the decree the decree is reversed and the cause remanded, with leave to amend pleadings and to take new evidence, if thought advisable. If the evidence shows that the money of the bank paid the first premiums on said policies claimed by appellant, then the court should allow such amount, with interest, to the bank, with like amounts since paid for premiums, if any, with interest, and the balance of the insurance money, if paid in to appellant for the use specified in the policy.

If the insurance money has not been paid, the decree should declare a lien on the policies for the amounts, if any, above indicated, and the assignment, or agreement to assign, to convey such interest only.

Decree reversed and cause remanded with directions.

HENRY G. EHLE

v.

FRED DEITZ.

*Replevin—Exemptions—Demand—Notice—Schedule—Failure to File—
Former Adjudication—Consolidation of Causes—Appraisal.*

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1. Property in the lawful possession of another under a distress warrant should not be replevied without previous demand.

2. The owner can not, under the statute concerning exemptions, become entitled to the possession of property held under a distress warrant, without first making out and delivering the required schedule.

3. It is proper in an action of replevin brought to recover property distrained, to submit to the jury, upon the request of the plaintiff, the question whether a reasonable time was given for the appointment of appraisers to value the same, after delivery of the schedule and before the institution of the suit.

4. An appraisal in an action of this character must show that the persons making the same were legally appointed.

5. It *seems* that the present suit is not barred by the former one, and that the statute in regard to consolidation of causes of action has no application.

[Opinion filed June 11, 1889.]

APPEAL from the Circuit Court of McHenry County; the Hon. CHARLES KELLUM, Judge, presiding.

Messrs. BARNES & SMILEY, for appellant.

"Where an officer holding proper legal process takes goods from the possession of the defendant named in his writ, he is but doing his duty and his possession is lawful, so that replevin can not be maintained against him without demand." Wells on Replevin, Section 368, and cases there cited; also, Tuttle v. Robinson, 78 Ill. 332; Holladay v. Bartholomae, 11 Ill. App. 206.

"To sustain the action of replevin for wrongfully taking and detaining a personal chattel, it is necessary to show that the defendant wrongfully took it from the actual or constructive possession of the plaintiff. This is elementary law." Simmons v. Jenkins, Adm., 76 Ill. 479; Johnson v. Prussing, 4 Ill. App. 575; Holladay v. Bartholomae, 11 Ill. App. 206; Ingalls v. Bulkley, 13 Ill. 315; Woodward v. Woodward, 14 Ill. 466.

"We understand the law to be well settled, that where a party obtains the possession of property lawfully, an action of replevin can not be maintained to recover it until a demand has been made and the possession refused." O. & M. Ry. Co. v. Noe, 77 Ill. 513; Clark v. Lewis, 35 Ill. 417.

"A debtor must make and present a schedule whether he has more or less property than is exempt, and if he leaves out any property he can not present a second schedule and include

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the property omitted from the first." Blair v. Parker, 4 Ill. App. 409; Biggs v. McKenzie, 16 Ill. App. 286.

"If a debtor wishes to avail himself of the benefit of the exemption law, he must present the officers with a schedule of all of his personal property, of every kind and character, including money on hand and debts due and owing to him." Sec. 14, Chap. 52, R. S., Exemptions; Blair v. Parker, 4 Ill. App. 409; Menzie v. Kelley, 8 Ill. App. 259; Biggs v. McKenzie, 16 Ill. App. 286; Cook et al. v. Bohl, 8 Ill. App. 293; Griffin v. Maxwell, 23 Ill. App. 405.

"There must be a strict compliance with the provisions of the statute before a party can claim the benefit of the exemption law." McMasters v. Alsop, 85 Ill. 157; Amend v. Smith, 87 Ill. 198; Griffin v. Maxwell, 23 Ill. App. 405, and cases there cited.

The first replevin suit is a complete bar to the second, as it was the duty of the plaintiff to avoid a multiplicity of suits, and include all the property in the first suit, as the same would still have been within the jurisdiction of a justice. Sec 49, Chap. 79, R. S; Mallock v. Krome, 78 Ill. 110; Nickerson v. Rockwell, 90 Ill. 460; Dulaney v. Payne et al., 101 Ill. 325; Lathrop v. Hayes, 57 Ill. 279; McKinney v. Finch, 1 Scam. 152; Lucas v. LeCompte, 42 Ill. 303; Casselberry v. Forquer, 27 Ill. 170; Camp v. Morgan, 21 Ill. 258.

Mr. J. F. CASEY, for appellee.

"Under the provisions of the act entitled 'An act to exempt certain articles from execution,' in force March 4, 1843, as a general rule it is the duty of an officer having an execution in his hands, before he proceeds to take or seize any of the personal property of the defendant in such execution by a levy thereon, to notify such defendant of his having such execution in his hands, if practicable, and thereupon it is the right of such defendant to select such property as he desires to retain under the act aforesaid, surrendering to the officer all his other property not thus selected or specifically exempt, for the satisfaction of such execution." Cook v. Scott, 1 Gilm. 333; Blair v. Parker, 4 Ill. App. 409.

"Where the law exempts property, to be selected by the execution debtor, the general rule is that the officer should give the debtor notice, if practicable, and thus afford him an opportunity before levy or sale to make the selection and claim the exemption. If the debtor is absent from the county, it is not practicable, within the meaning of the rule, for the officer to give such actual notice." *Foots v. The People*, 12 Ill. App. 94.

"The law sets apart certain specified property and wholly exempts it from execution or attachment." *Cooley on Torts*, 395, 396.

"A statute exempting property from levy and sale is not to be construed strictly, but so as to carry out the obvious intentions of the legislature." *Washburn v. Goodheart*, 88 Ill. 229; *Good v. Fogg*, 61 Ill. 449.

LACEY, J. The appellee was the owner of certain personal property and was the head of a family, residing with the same, and was indebted to George Bardwell, his landlord, for certain rent due him.

Bardwell placed in the hands of appellant a landlord's warrant against appellee, ordering the said bailiff to make of the goods and chattels of appellee a certain sum of money claimed for rent. Thereupon appellant levied upon certain goods and chattels of appellee, without first giving him notice of the fact that he had the warrant to execute. On the 16th of November, 1887, the appellee commenced his replevin suit against appellant, before a justice, to recover certain of the property held under the warrant. On the same day the appellee handed appellant his certain schedule made out, as is insisted according to the provisions of section two of the act concerning the exemption of personal property, Session Laws, 1887, p. 179, but whether or not it was handed to appellant before or after the replevy is not entirely certain, but the weight of the evidence seems to be that it was not so delivered till after the goods were replevied, and that no demand was made of appellant for the property prior to the time the suit was brought.

The appellant then proceeded to judgment on the distress warrant, and after obtaining a judgment in favor of Bardwell for the rent due him, the justice before whom the judgment was obtained issued a special execution, which was placed in appellant's hands, ordering him to make sale of the balance of the property not replevied, remaining in his hands, to satisfy the judgment.

On November 4, 1886, the appellee made out and delivered to the sheriff a new schedule as provided by statute, containing the same property as the first one, and also some additional articles omitted from the first. The appellant did not act under said last schedule or either of them as to the appraisal of the property remaining in his hands, or as to any of it, but received the special execution into his hands of date of November 20, 1886. Thereupon, on the 30th day of November, 1886, the second replevin suit was commenced by appellee before a justice, and the balance of the property replevied. After the trial of the causes before the justice they were appealed to the Circuit Court, and there, being consolidated by agreement, were tried, resulting in a verdict for appellee, and judgment on the verdict by the court and appeal to this court.

Various questions are raised and urged on our attention as cause of reversal.

1. It is urged that the evidence failed to show demand for the property by appellee before suit brought.

2. The first replevin suit was commenced before schedule was delivered to appellant.

3. The schedule did not contain a list of all appellee's property.

4. The first replevin suit was a bar to the second one.

5. The instructions for appellee were erroneous.

6. The court erred in refusing appellant's instructions.

7. It was error because the court admitted in evidence the two appraisement lists made out by James Duffield, Ira Slocum and Judd.

8. Because the court erred in not setting aside the verdict and granting appellant a new trial.

There were also some minor objections not necessary to notice.

The instructions of appellant, which were refused, are as follows:

"The jury are further instructed, as a matter of law, that even though the jury may, and do believe, from the evidence, that the property mentioned in said schedule was worth less than \$400, still, unless the plaintiff has shown by a preponderance of the evidence that he made a demand on the defendant, Ehle, for the property in controversy before he commenced the replevin suits, you should find a verdict for the defendant, Ehle, if the jury believe the property had been levied on by Ehle on the 15th day of October, and that Deitz knew of such levy the day it was made."

"The court instructs the jury, as a matter of law, that even though the jury may and do believe from the evidence that the property mentioned in the schedule that was presented to the defendant, Ehle, was worth less than \$400, still, unless the plaintiff, Fred Deitz, has shown by a preponderance of the evidence that he presented the schedule to Ehle before he commenced the replevin suit before J. H. Johnson, you should find a verdict for the defendant, Ehle, as to the property in said replevin suit."

We are of the opinion that the above instructions should have been given. The possession of the property under the distress warrant in the first instance under the statute was lawful, and before the appellant could be put to costs by the commencement of a suit for the wrongful detention of the property, a demand should have been made in order to enable him to give up the property, even if otherwise the appellees were entitled to the possession of the property.

Before, in any event, the appellee could have become entitled to the possession of the property under the provisions of the statute concerning exemptions of personal property above referred to, he should have delivered a schedule to the appellant. Without such schedule, and with neglect and refusal to make out one and deliver it, the right to claim his exemptions would be forfeited. Therefore the second of the

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above instructions should have been given. *Griffin v. Maxwell*, 23 Ill. App. 405.

As to the property described in the first replevin suit there seems to be slight evidence that the appellant had any time given him, or a reasonable time, to appoint appraisers to value it after appellee delivered his schedule, if he delivered one at all, before he instituted his suit. Yet we can not say it was error to submit that question to the jury at the request of the appellee, as there was some evidence on the subject. We think the court committed no error in giving the instructions in regard to the effect of the omission by appellee of certain property from his schedules.

It appears that the court admitted two lists of appraisals of appellee's property, made by Duffield, Slocum and Judd, against the objection of appellant. This was error. It does not appear by whom these self-constituted appraisers were appointed, except that appellant did not appoint them under the statute. Such appraisals were not evidence of anything. Two of said appraisers were sworn, but failed to testify as to the value of the property set forth in the appraisement, only saying that the list contained the value of the property according to the appraisement. There was no other evidence as to the value of the property.

We are not prepared to say, under the evidence, that the first replevin suit was a bar to the subsequent one, or that the statute in regard to consolidation of causes of action applies to this class of cases.

The judgment of the court below is reversed and the cause is remanded.

Reversed and remanded.

EUGENE PATNEAUD

v.

HYPPOLITE CLAIRE.

Real Property—Drainage—Natural Course and Outlet—Obstruction of—Easement.

1. Where the natural course and outlet for water on the land of one owner is over the land of another, such course can not be obstructed.

2. A purchaser of land knowing that such a ditch runs across it from the land of another, can not lawfully close the same.

[Opinion filed July 1, 1889.]

• APPEAL from the Circuit Court of Iroquois County; the Hon. O. F. REEVES, Judge, presiding.

Messrs. KAY & EVANS, and DOYLE, MORRIS & PIERSON, for appellant.

Patneaud had a right to fill up that drain; it was a valuable right, a right vested in him by law; he had never consented to the making or repair of that drain in any way, as recognizing the right of any one to keep it open. It would not be competent for the legislature to divest him of that vested right without his consent, or by due process of law. *Bruce v. Schuyler*, 4 Giln. 224; *Deining v. McConnell*, 41 Ill. 227; *Allwood v. Mansfield*, 81 Ill. 314; *Mix v. Vail*, 86 Ill. 40; *Dobbins v. First Nat'l Bank of Peoria*, 112 Ill. 553.

There is no evidence in this record upon which to base an instruction upon the question of easement. An easement always has its origin in unity of seizin, and then it must exist with a knowledge of the one holding the title. *Morrison v. King*, 62 Ill. 30; *Ingalls v. Plamondon*, 75 Ill. 118; *Cihak v. Klekr*, 117 Ill. 643.

The Illinois Central Railroad never consented to the making of these drains, nor had knowledge they were made.

Messrs. HARRIS & HOOPER, for appellee.

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The ditch was a continuous and apparent easement necessary or convenient to enjoyment of estate and upon severance of the heritage by the railroad company, passed by implication with the dominant estate. Washburn on Real Estate, Vol. 2, page 36 to 38, edition 1862; Morrison v. King, 62 Ill. 34; Ingalls v. Plamondon, 75 Ill. 118; Cihak v. Klekr, 117 Ill. 652.

C. B. SMITH, J. This suit was commenced before a justice of the peace and upon a trial there the plaintiff had judgment for \$82.50 and upon appeal to the Circuit Court another trial was had before a jury resulting in a verdict for the plaintiff for \$18. The court overruled a motion for a new trial and rendered judgment on the verdict. The defendant now prosecutes his further appeal to this court and assigns various errors and asks for a reversal of the judgment.

The facts as disclosed by the evidence in this record are substantially these: Appellant and appellee are adjacent land owners. Appellant, Patneaud, owns the west half of the northeast quarter section 6, T. 27, R. 13 W. Appellee, Claire, owns the east half of the northwest quarter of the same section. Patneaud again owns the north half of the west half of the northwest quarter of section six and which lies immediately west and adjoining Claire's eighty-acre lot. It appears that all these lands formerly belonged to the I. C. R. R. Co., and that in 1860 one Waters purchased the eighty now owned by Claire and that one Tomlins then purchased the forty-acre tract which is now owned by Patneaud and which lies west of Claire's land. While these two men were in possession of the land under the contract of purchase they mutually agreed to and did make a ditch, running across both the eighty and the forty-acre lot, running and carrying the water westward across the forty acres now owned by appellant. This ditch was made about the year 1860, and was kept open by the joint labor of both of them for a number of years. Both of them, however, finally failed to pay the railroad company for the land and it reverted back to the company and their contracts of purchase were canceled. The land was again

sold and after a number of conveyances, finally came into the hands of appellant and appellee as above stated, with the ditch on it. The ditch was kept open for several years and carried the water off plaintiff's land over defendant's land as it had always done, both defendant and plaintiff helping to keep it open, until about six or seven years ago appellant asserted a distinct and separate ownership of the ditch, denying any right of appellee to it, and finally he determined to tile his land, and desired to and did put tile in the bottom of the old ditch, following the ditch to its outlet on the west line of his land. After putting in his tile he filled up the ditch to the original level of the ground and in addition to filling up the ditch, he made a dam across the ditch, just west of the division line between his forty and plaintiff's eighty. This dam was about three and one-half inches above the common level of the ground and was about twenty feet wide. In addition to building this dam appellant also built a hedge fence on the line between himself and appellee without leaving any opening for the water to pass through as it was accustomed always to do. The proof from both sides is, that all the land in that vicinity is very level and the fall very slight. It also appears very clearly that the natural outlet for the water on plaintiff's land was westward over appellant's forty acres and that its natural outlet before and since the ditch was dug, was along the line of the ditch. All parties recognized this fact by placing the ditch there, and appellant admits it by placing his tile in that bottom of the ditch, and by making his dam there, to prevent the flowage of plaintiff's water upon his land. The proof is also abundant that this three and one-half inch dam caused the water to flow back and cover something like twenty to thirty acres of plaintiff's land. Appellant admits putting the dam there, but says when he ascertained that a claim was made that it was above the level of the surface he took it down about three inches to the level of the ground.

Counsel for appellant has discussed many legal questions concerning easements, rights by prescription and dedication, and how they may arise and be gained or lost, but in the view

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we take of the case, it becomes a very simple matter, and it is wholly unnecessary for us to consider the various questions made which are not necessary to a correct decision, as we think the judgment is clearly right under the admitted facts in the case.

As we have said, the proof is clear that the natural course and outlet for the water on plaintiff's land, was over the defendant's land, along the line where the ditch was dug, and without any reference to the ditch. the plaintiff had the clear legal right to have the surface and other water naturally falling on his land, pass over the land of appellant in its natural course without obstruction by dams or fences. The law upon this question has been so long and so well settled everywhere that it is a mere waste of time to discuss it further. *Peck v. Harrington*, 109 Ill. 611.

Under the great preponderance of the evidence in the case the jury could not have found correctly a different verdict. The verdict is small and was, we think, fully justified by the evidence. The second instruction given for the plaintiff recognizes and declares the law to the jury as we have above stated it, with entire accuracy. A great many instructions were given in the case and a number also refused. We have carefully examined all of them and without stopping to discuss them in much detail we shall content ourselves by saying we think the jury was fairly and correctly instructed. The law was given to the jury for appellant quite as favorably as he had any right to ask.

The first instruction in substance informed the jury that if Patneaud bought his land with this ditch then upon it, running from plaintiff's land across his own, and that he knew of its existence, then he took his land with this burden upon it, and that he had no right to afterward stop it up. This instruction we think announces a correct rule of law. An easement existed over the servient heritage in favor of the dominant one to have the water flow through the ditch, as it had been accustomed to do before appellant bought his land. *Ingalls v. Plamondon*, 75 Ill. 118; *Morrison v. King*, 62 Ill. 34; *Cihak v. Klekr*, 117 Ill. 652.

The instruction given by plaintiff relating to proof of a prescriptive right was not erroneous, though it may not have been fully supported by the proof, but it could do defendant no harm, since instructions given on his own behalf fully and clearly explained the law to the jury so that they could not be misled. If error at all, it was harmless. The evidence clearly supported the verdict.

Seeing no error in the record the judgment is affirmed.
Judgment affirmed.

JOHN KING

V.

C. H. EDWARDS ET AL.

Landlord and Tenant—Lease of Coal Lands—Conditions—Forfeiture—Construction.

Upon suit to recover possession of leased coal lands this court holds: That the words in the lease fixing the date for the payment of the rent, were merely to fix dates for settlement, and did not bind the lessees absolutely to mine coal before those days; that the lessees were not bound to open the mine by means of a shaft upon the land itself; that it was their right, if they so preferred, to open the mine by means of a shaft and a subterranean drift started upon other land, provided they prosecuted such work with reasonable diligence, and that the trial court properly found that the lessees used reasonable diligence to open the mine.

[Opinion filed December 16, 1889.]

• APPEAL from the Circuit Court of Peoria County; the Hon. F. M. SHAW, Judge, presiding.

This suit was brought by the appellant before a justice of the peace to recover possession of a hundred and sixty acres of coal land leased to appellees by appellant November 11, 1887. The Edwards Coal Co. became the assignee of the lease and is party defendant in the suit. After trial before

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the justice the suit was appealed to the Circuit Court. The case was tried in the Circuit Court on appeal by the judge without a jury and resulted in the court finding in favor of appellees and giving judgment against appellant for costs, from which judgment this appeal is taken.

The object of the suit was to establish a forfeiture of the lease, which had been declared by appellant, and the defendants notified of the fact April 14, 1888. The notice declared that appellant had determined to forfeit said lease on account of the failure of appellees to mine coal and mineral, not paying royalty on the same as provided in said lease for the premises described in the notice and held by the lessees, and the lessees were notified to deliver up possession within sixteen days. The following is a copy of the lease:

"This indenture made this 11th day of November, 1887, between John King, party of the first part, and Henry C. Young and Charles H. Edwards, parties of the second part, witnesseth: That the party of the first part in consideration of the covenants and agreements hereinafter mentioned to be kept and performed by the parties of the second part, their executors, administrators, heirs and assigns, has leased to the said parties of the second part all the coal and minerals underlying the following tract, to wit: The southwest quarter of section 10, township 9 north, range 6, east of the 4th P. M., Peoria county, Illinois, to have and to hold, to the parties of the second part, from the 11th day of November, 1887, to the 11th day of November, 1897. And the parties of the second part in consideration of the leasing of the coal and minerals underlying the above described tract of land covenant and agree with the party of the first part to pay the party of the first part as rent for said coal and minerals five cents per ton for all coal and minerals sold from said premises by the parties of the second part, said rent to be paid as follows, to wit: The first days of January and July of each year after the date of this lease. It is further agreed by the parties of the second part that at the expiration of the term of this lease they will yield up the premises to the party of the first part without notice. It is fur

ther understood and agreed by the parties aforesaid that the parties of the second part shall have the privilege to occupy as much of the surface of the above described premises as is necessary and convenient to erect all necessary machinery for the mining and storing of said minerals, for tramways and switches for transporting the same, for sinking shafts, for drifting or making slopes for said minerals, for air-shafts necessary and convenient for the safety of said mines, and said mines may be opened at any point on said premises by said parties of the second part that in their judgment it will be most convenient to reach said minerals. It is further agreed that the party of the first part shall have privilege of examining the books of record showing the amount of minerals taken from said mines during the term of this lease. The covenants herein shall extend to and be binding upon the heirs, executors and administrators and assigns of the parties to this lease. Witness the hands and seals of the parties aforesaid the day and year above written.

"JOHN KING, [SEAL.]

"C. H. EDWARDS, [SEAL.]

"HENRY C. YOUNG. [SEAL.]"

The following is a stipulation.

"Stipulation read as follows: It is stipulated that the Edwards Coal Co. may and hereby does, enter its appearance (it being a corporation) in the above case as defendant, and it is agreed that the notices served upon C. H. Edwards and H. C. Young shall be taken, and are valid and binding upon said company to the same extent as if said notices had been duly served on this company.

"October 8, 1888.

"EDWARDS COAL COMPANY,

"By W. T. Whiting, attorney.

"H. C. YOUNG,

"C. H. EDWARDS,

"By their attorney, W. T. Whiting.

"JOHN KING,

"By Sheen & Lovett, his attorneys."

It appears that the facts are not much in dispute. Up to the time of the trial the lessor had received no rent under the lease, nor had there been any coal or other mineral taken out of the premises, nor any machinery erected on the surface of the land for the storing of coal or minerals, or switches or tramways for transporting coal or minerals placed on the land, nor were any of the above improvements contemplated being placed on the land by appellees. The appellees had dug a small hole on the land, ten or twelve feet deep, a few weeks after the lease was made. There had been no drifts or slopes sunk on the property for coal or other minerals, or in connection with any mine under the land, nor had any mine been opened on the land described in the lease.

It seems that the land of Daily corners with the King land at the northeast corner, and from the nearest point on the King land to the C. B. & Q. R. R. is two or three rods, and it was necessary for appellees, to reach the railroad for transportation of coal, to cross Daily's land, for which they had no right of way; but he, Daily, testified that he was willing for a reasonable price to grant them the right of way for a tramway across his land to the railroad, but that they would come to no understanding about it with him. After the above lease was executed the appellees leased a tract of land lying east of King's, where there was access to the railroad, and commenced in March after the date of the lease to sink a shaft on Harding's land and run it toward King's land with a view to opening up the mine in that way by a subterranean route from the railroad to the King land.

There was 120 yards of the shaft already finished and there remained 360 yards more to complete to reach the coal on King's land, and the appellees were at work driving the shaft as fast as they reasonably could, part of the time with a double shift of hands by which from three to four yards per day could be driven. It appears from the evidence of the mine boss, John Yates, that the proposed subterranean road to the King land was the most practical route; the nearest because north of the slough (on King's land); there is not any coal on the north, the main body of King's coal lying on the

south part of the land. It would not be a direct route to take the coal over the ground leased by the Edwards Coal Co. to the railroad. It could be taken over their land by a circuitous route following the slough, but it would cause a pretty big expense, larger than the subterranean route. It cost \$1.10 per yard to make the entry after the first twenty-five yards and \$5 per yard for that. It would cost \$200 to sink a shaft on King's land. It would cost \$350 to prepare the road bed to receive the track from where the trestle would be to the coal on the King land. The track on the surface would be about the same as the track under ground.

The reason given by Mr. Edwards for not commencing to open the shaft in the winter was that it was much more expensive. But as King wanted them to open up the mine they sent some men over there and they dug a prospect hole fourteen feet deep on the north side of the slough but found nothing but sand, and then, as it would not be practical to hunt coal in a sand bank, they stopped. They thought then it would be a good thing to lease Harding's land close to the railroad, so they leased it for fifteen years. "My intentions in leasing King's land were honest. I expected to work King's coal after leasing Harding's. In planning the work I intended to open an entry leading to the main coal of King's land. I began the work in March and continued as fast as I could, day shifts, until within a few weeks before I went out of the company in July. Young testified it was his endeavor to get to King's coal as soon as possible. There is no object or intention on the part of those interested in the King lease to hold the coal land without mining it. Having the King lease for only ten years it was their interest to take the coal out of his land first. The parties in interest think the way we are doing is the most practicable, the cheapest but not the quickest."

The above are substantially all the facts developed on the trial.

Messrs. SHERN & LOVETT, for appellant.

In this case a lease was made for the mining of coal,

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and semi-annual pay days were expressly agreed upon, and the lessees had a right to open a mine at any point on said premises and to use so much of the surface of the land as was necessary to erect machinery, tramways, switches, shafts, slopes, air-shafts, etc. There is here a clearly implied covenant that a mine will be opened, and coal taken out, if it is there to be taken, and sold if there is a demand for it; and that it is not to be taken out by the spoonful, but that the mine will be operated as mines usually are.

An express contract is not necessary upon every detail, but some covenants are implied from others that are expressed, when necessary to complete the evident intention of the parties. *Oaks v. Oaks*, 16 Ill. 107; see also *Luman v. Gage*, 37 Ill. 28; *Walker et al. v. Tucker*, 70 Ill. 542; *Leavens v. Cleary*, 75 Ill. 352.

Mr. W. T. Writing, for appellees.

The lease contains no express covenant or agreement as to how the coal underlying the leased premises should be worked or that any specified amount of coal should, within a given time, be mined on the premises; but appellant contends that he can maintain this action to forfeit the lease, because appellees failed to mine coal on the premises before the time named in the lease, for the payment of "five cents per ton for all coal and minerals sold from the premises," upon the ground that the covenants in the lease require lessees to proceed to mine coal on the premises before the first days of January or July, after the date of the lease. The question whether there are such covenants in the lease depends, like other questions of the construction of contracts, upon the intentions of the parties. No precise words are necessary to constitute a covenant, provided we are able to collect an agreement by the parties that a certain thing shall be done, that will be sufficient to enable us to say that a covenant is created. But the court must be satisfied that the language does not merely show that the parties contemplated that the thing might be done, but it must amount to a binding agreement upon them that the thing shall be done. *Smiley v. McLaughlin*, 138

Mass. 363; James v. Cochrane, 7 Exch. 170, S. C., 8 Exch. 556.

Where parties have entered into an agreement with express stipulations, the presumption is that they have expressed all the conditions by which they intend to be bound, and courts can not extend their covenants by implication, unless the implication is clear and undoubted. Smiley v. McLaughlin, 138 Mass. 365; Aspin v. Austin, 48 E. C. L. R. (5 Q. B.) 671; Rashleigh v. S. E. Ry., 70 E. C. L. R. (10 C. B.) 612.

The proposition of law submitted by appellant to the trial court, as modified by the court, correctly stated the law governing this cause. The modified proposition is as follows:

"Under the lease offered in evidence, it was the duty of lessees or their assigns therein to sink a shaft, or a slope or drift, upon or near the premises in controversy, within a reasonable time, and to endeavor in good faith in that way to mine coal from said premises, and a failure to use reasonable diligence in so doing would be a default in the terms of said lease."

The law of this case as above stated is sustained by the following authorities: Carl v. The Granger Coal Co., 69 Iowa, 519; Koch's and Ballirt's Appeal, 93 Pa. St. 434-441; Guth's Appeal, 2 Cent. R. 767; Price et al. v. Nicholas, 4 Hughes, U. S. C. Ct. R. 616.

LACEY, J. There seems to be a wide difference between the counsel for the respective parties as to what is the proper construction of the contract. On the part of counsel for the appellant it is insisted that the proper construction of the contract is that the lessees absolutely bound themselves to pay royalty for the coal on the "first day of January and July for each year" and that the first payment was absolutely due on January following the contract. Hence, that required the mine to be open at least by the first of January following the date of the contract, otherwise no coal could be sold or rent paid. Furthermore that by the terms of the agreement the appellees were bound to mine the coal from a shaft sunk on the land of King and occupy as much of the surface of the

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land as necessary for the necessary machinery for the mining and storing of said materials, for tramway and switches for transporting the same, for sinking shafts, for drifting or making slopes for said minerals.

On the other hand counsel for the appellees insist that there was no specified time when the mine should be open except that under all the circumstances it should be opened in a reasonable time. That there was no covenant on the part of the lessees that the mine should be opened on the land of appellant; that to do so was simply a privilege.

After the careful reading of the contract and all its parts we are inclined to adopt the view of the contract entertained by the counsel for appellees.

In our opinion the words contained in said lease, to wit, "To pay the party of the first part as rent for said coal and minerals five cents per ton for all coal and minerals sold from said premises by the parties of the second part, said rent to be paid as follows, to wit: The first days of January and July of each year after the date of this lease," simply mean to fix a day on which settlements for all such sums received for coal, etc., shall be made, and have no purpose to bind the lessees absolutely to mine coal before those days. It was a day fixed for settlement if before those days the lessees under the other terms of the contract had anything in their hands to settle for.

As to appellant's other contention, that the mine was to be opened on his premises, we think him equally at fault. The granting part of the lease which gives the right to mine the coal makes no mention of the manner of mining it or where or how it shall be taken from the land. It simply provides in these words, the party of the first part "has leased to the parties of the second part all the coal and minerals underlying" the premises in question. Then follows in the contract "in consideration of the above" the rent stipulated for it to be paid. Without anything further in the lease it is probable that a covenant on the part of the party of the first part would be implied, giving the lessee the right to occupy so much of the land as was necessary to take the coal from

under the ground, but certainly he would not be compelled to go upon the land at all if he could get the coal without. All that follows in this lease after the granting clause above, is to give the appellees the privilege to open the mine on the land and carrying on the mining from the surface, using so much of the land as necessary for such purpose; but there is no covenant on the part of the lessee agreeing to avail himself of such privilege. The royalty for the coal is the only thing that appellant can be concerned about; when he has received that the lease as to him is satisfied so far as the covenant in question is concerned. There now only remains the question of the matter of fact as to whether or not the appellees were proceeding to open up the coal mine within a reasonable time. The judge in the court below trying the case in place of the jury, by agreement of the parties, found that the appellees were using due diligence in that regard. Unless we can see that the court found manifestly against the weight of the evidence this court has no power to disturb it. After a careful review of the evidence we can not find that it has. We are satisfied that the evidence supports the finding of the court. All the circumstances of the case had to be considered, such as the relative cost of the two methods of obtaining the coal, the time required to reach it, the convenience of obtaining and marketing it after it was received, the interests of appellees as well as the appellant in the premises. If a more definite time for the opening of the mine had been desired to be fixed it should have been provided for in the contract. In determining the matter of forfeiture the court below should, and no doubt did, take into consideration the law which holds that forfeitures are not favored, in fact are abhorred, and that a case to justify a forfeiture must be clear. We feel satisfied the court did not err in its finding of the fact in that particular.

It will appear from what has been said in this opinion as to the proper construction of the contract that the court did not err in its refusal and modification of appellant's proposition of law asked to be held. The ruling of the court in that par-

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ticular was correct. We find no error in the record and therefore the judgment is affirmed.

Judgment affirmed.

C. B. SMITH, J., dissents. I can not agree with the construction placed upon the contract of leasing by the majority of the court. By the construction placed upon the lease of the coal lands by the court, I think the manifest purpose and plainly expressed object of the lease is defeated. In the face of the expressed language, that the lessee shall mine and pay for coal on certain days at a certain rate, he is relieved from mining coal at all, except as his convenience at some future time may permit. Instead of sinking a shaft on appellant's land, as is clearly contemplated by the lease, appellee disclaims any purpose to do so at any time within the life of the lease, but claims the right to mine coal through a tunnel and shaft under other lands, and after the coal under other lands has been mined. The mere argument of convenience is set up as a bar to the plain requirements of this lease. I know of no rule of law that will justify that construction to defeat the plainly expressed covenant of this lease. I think the judgment ought to be reversed.

BENJAMIN H. WARDER ET AL.

V.

FRANKLIN D. SWEETSER.

Partnership—Members—Individual Debts of—Payment—Firm Funds—Set-off.

Upon a bill filed by a member of a firm calling, among other things, for an itemized statement of payments made with partnership funds, by a defaulting co-partner, to liquidate private debts due manufacturers with whom such firm habitually dealt, suit having been brought by them against the firm to recover a balance due and unpaid, and that such payments be applied in satisfaction of the firm indebtedness, this court holds, that the promise of complainant to assume such payments was conditional, not absolute, and declines to interfere with the decree in his behalf.

[Opinion filed December 16, 1889.]

IN ERROR to the Circuit Court of La Salle County; the
HON. DORANCE DIBELL, Judge, presiding.

Messrs. BOYSEN & LAWRENCE, for plaintiffs in error.

Mr. D. B. SNOW, for defendant in error.

UPTON, P. J. Prior to January 8, 1886, Franklin D. Sweetser was engaged in business at Ottawa, Ill., in the sale of agricultural implements; his half brother, J. Howard Sweetser, was engaged in the like business at Streator, Ill. The plaintiffs in error were then, and long prior thereto had been, engaged in the manufacture and sale of agricultural implements and machinery, having a place of business at Chicago and having prior to the time above indicated had dealings with both Franklin D. and J. Howard Sweetser, in the business above indicated.

At the time above stated J. Howard Sweetser was indebted to plaintiffs in error about \$1,200 or more, of which Franklin D. was not informed. Franklin D. Sweetser being at the time in poor health and requiring rest, entered into the following contract.

"This contract made and entered into between F. D. Sweetser and J. H. Sweetser this 8th day of January, 1886. 'Whereas' F. D. Sweetser has an interest in the agricultural implements, seed and sewing machine business of \$12,000 (twelve thousand dollars), J. H. Sweetser to take the business and run the same, in consideration of which, said J. H. Sweetser is to pay said F. D. Sweetser the interest on the above \$12,000, at the rate of six per cent. per annum, payable quarterly, in payments due and payable each year, of seven hundred and twenty dollars (\$720).

"This contract is to run one year, or more, as the contracting parties can agree; and if F. D. Sweetser at some future time take the 'concern' back to his possession, the said F. D. Sweetser to allow said J. H. Sweetser the actual cash

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value of the 'goods' on hand, or what they can be bought for in cash, at time of settlement, 'freight to be added.' Also, said F. D. Sweetser is to allow said J. H. Sweetser the cash value of notes and accounts at time of settlement.

"It is also agreed that the 'concern' shall be known as F. D. Sweetser & Co., until the final settlement and ending of this contract. The goods to be kept insured by said J. H. Sweetser during the continuation of this contract.

"F. D. Sweetser further agrees to guarantee to J. H. Sweetser a yearly profit to him of \$600 (six hundred dollars). J. H. Sweetser agreeing to put his whole time to said business.

"Witness our hands and seals this day above mentioned.

"F. D. SWEETSER.

"J. H. SWEETSER."

Under this contract J. Howard Sweetser took possession of the goods and store in Ottawa, Franklin D. Sweetser going east, and the business was conducted by J. Howard Sweetser until August, 1886, when the partnership was dissolved.

At the time of F. D. Sweetser's leaving Ottawa for the east, he left in his iron safe in the store (to which J. Howard Sweetser had access for the business of said firm) his personal private papers, promissory notes and books of accounts.

Upon the return of F. D. Sweetser as hereinafter stated, by the wrongful, improper and unauthorized use of moneys of the firm and by the like improper and unauthorized use of the private notes and bills receivable belonging to Franklin D. in his own right, Howard Sweetser was indebted to him for more than \$5,000.

Prior to the 8th of January, 1886, J. Howard Sweetser was personally indebted to the plaintiffs in error in a sum exceeding \$1,000, as security for which (and payment as collected), he delivered farmers' notes of the face value of \$1,200, of which he guaranteed the payment. These notes were afterward ascertained by plaintiffs in error to have been fictitious or forgeries, of which transaction, either in whole or in part, Franklin D. Sweetser was not apprised. On the 20th day of January, 1886, after Franklin D. had left

for the east, plaintiffs in error applied to J. Howard Sweetser to take up the notes held by them against him and those held as security therefor, or, knowing the worthlessness thereof, had succeeded in obtaining from him \$200 in cash, and other notes made payable and belonging to the firm of "F. D. Sweetser & Co.," together with a note payable to "C. Aultman & Co.," belonging to the defendant in error in his own right, which had been wrongfully taken from the private papers of defendant in error from the safe wherein the same had been left for safe keeping as before stated, amounting in the aggregate to about \$700, together with a note for \$250 executed by J. Howard Sweetser in the name of the firm.

Upon these notes so held by them, plaintiffs in error collected \$742.60 and applied the same in satisfaction of their debt against J. Howard Sweetser individually, and without the knowledge, authority or consent of the defendant in error, as found by the court below.

The firm of "F. D. Sweetser & Co.," subsequent to January 20, 1886, became indebted to plaintiffs in error for goods and wares purchased by J. Howard Sweetser in the sum of \$697, upon which indebtedness a suit was commenced at law in the Circuit Court of La Salle County, and upon issue being joined therein, this bill was filed in equity, alleging, in substance, the matters herein before stated, and asking that the itemized statement of plaintiffs in errors' claims and demands be made and set forth and discovery made of all moneys paid them and of all notes received in security for, or in satisfaction of such indebtedness, together with all moneys received thereon, or applied in satisfaction of the individual indebtedness of J. H. Sweetser by said plaintiffs in error, and that such sum so received be applied in satisfaction of any indebtedness due from the firm of F. D. Sweetser & Co., if any, to plaintiffs in error, and averred the total insolvency of J. Howard Sweetser. The bill was afterward amended but its scope was not materially changed. The prayer was for an accounting, set-off and general relief. Plaintiffs in error filed their answer, and after the cause was at issue the following stipulation was filed in the cause: 48. "It is hereby stipulated, by and between the at-

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torneys for the respective parties hereto, that this cause shall be submitted to the court for trial at the present term of the Circuit Court of La Salle County, and shall be set down for trial and heard as speedily as the court will set the same for a hearing; that if, upon the hearing of said cause, the court shall be of opinion that it has no jurisdiction to hear the same as a chancery suit, and that equity has no jurisdiction of said cause, then said cause shall be deemed and considered as having been tried and heard by the court upon the issues in the suit at law now pending in said court, and such judgment shall be rendered in such suit at law as the conclusion or opinion of the court may justify, and as it would have rendered if the same had been submitted to it upon the issues formed in the suit at law. If the court shall find that the defendants in this suit are indebted to complainants, then a judgment or decree may be rendered for complainants, the same as on the plea of set-off in the common law case. And if the court shall be of opinion that said suit is properly heard as a cause in equity, then a decree shall be rendered if the finding is for the defendants, on the merits, the same as if a cross-bill had been filed in said suit.

A hearing was had which resulted in a decree for defendant in error for the sum of \$255, and the cause is here by writ of error, errors and cross-errors being assigned upon the record.

As to the 1st, 2d, 3d and 4th assignments of errors we need only say that our attention has not been called by the arguments or suggestions of either counsel, to any matter presented by the record before us, to sustain or support the same, and we conclude there are none, and that the same are not well taken. As to the 5th and 6th, which are, in substance, that the decree entered below was erroneous because not supported by the testimony in the case, and is broader than the facts justify, we do not think are well taken.

In this contention, counsel for plaintiffs in error lays stress upon what he seems to regard as a ratification by Franklin D. Sweetser, of the acts of J. Howard Sweetser, in his dealings with plaintiffs in error, in the use of co-partnership assets in liquidation and payment of his personal indebtedness.

This is largely a question of fact. The chancellor, no less certainly than a jury, is the sole judge of the credibility of the witnesses. They are before him, and he, far better than any appellate tribunal, can rightfully determine where the truth is, upon the questions in issue; besides, we are entirely satisfied from the facts and circumstances in evidence, apparent of record, that the chancellor was fully justified in the holding upon that point, both on the facts and the law, and we do not deem it necessary to go over the evidence in detail in that regard. The contention was simply whether the promise was a conditional one, or unconditional. In this the court held it conditional and we are entirely satisfied, on the facts in this record, with that finding.

Another consideration is urged by the counsel for the plaintiffs in error—that the defendant in error had credited J. Howard Sweetser with but \$300 for the entire property transferred to him by the bill of sale, invoiced at some \$900. We are entirely satisfied that, as shown by the evidence in this record, \$300 was the full cash value of the property, and we should have been quite satisfied if the court below had entirely ignored that item in this adjustment, and regarded the same as applied to the general indebtedness due from J. Howard Sweetser to the defendant in error, of which there is a large sum, as shown; first, because we think there are in this record evidence and circumstances tending strongly to support that view, and second, F. D. Sweetser was under no legal or moral obligation to pay the debts of J. H. Sweetser; but the court took a different view, and while we can not say he was not justified in so holding, we think plaintiffs in error can not be heard to complain.

It is further urged that the books of F. D. Sweetser & Co. and the entries therein establish the fact of the adoption of the transaction between J. Howard Sweetser and the plaintiffs in error as to the payment of the individual debts of J. Howard Sweetser with the assets of the firm of F. D. Sweetser & Co., and he should be held estopped from denying it, etc. It will be borne in mind that the evidence shows that F. D. Sweetser had not been in Ottawa, where his busi-

ness was carried on, and knew nothing concerning the transfer of the notes in question until the 29th of July, 1886, when he immediately started home; passing through Chicago, he called upon plaintiffs in error, informed them that the notes held by them for the indebtedness of J. Howard Sweetser were the assets of the firm of F. D. S. & Co., and improperly and illegally transferred to them by J. H. Sweetser, but that, if he found that J. H. Sweetser had not got him in exceeding a certain amount, naming it, that he would "father" the transaction.

He had not at that time any means of knowing what the condition of affairs actually was. In that endeavor certain memorandum entries, as he swears, were made upon the books, not by F. D. Sweetser, but by J. H. Sweetser, which there is no evidence showing plaintiffs in error knew of, or were in the least influenced by in these memorandum entries, upon which an estoppel is sought to be predicated.

It is true J. Howard Sweetser swears that those entries were made by himself at the direction of F. D. Sweetser. This is positively denied by defendant in error, and we are not prepared to say that in view of what appears in this record the court below was not fully justified in disregarding the statement of J. H. Sweetser, in that regard at least.

We have carefully examined the record in this case, in the light of the able argument submitted to us for plaintiffs in error, and we find no error therein of which the plaintiffs in error can complain. In regard to the cross-errors assigned by the defendant in error, we have only to say, we do not deem either point made, well taken.

The \$219 cash paid to plaintiffs in error by J. Howard Sweetser is not sufficiently shown by the proof to have been the moneys of the defendant in error, to warrant its allowance; and as to the \$300 for the value of the property in the bill of sale from J. H. to F. D. Sweetser, we have already expressed our views, and the decree made by the court being in our judgment substantially correct, is affirmed.

Decree affirmed.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY
v.
ANTOINE GOYETTE.

*Railroads — Fire—Weeds — Locomotive — Damages — Declaration—
Amendment—Continuance—General Verdict—Special Findings—Instruc-
tions.*

1. An application for a continuance, made upon the amendment of the declaration, may be properly overruled, where the affidavit in support thereof is admitted in evidence by the plaintiff in accordance with the statute, and it does not appear that the defendant could have reasonably been prejudiced in his defense by the amendment.

2. All parts of a verdict are to be so reconciled, if it can reasonably be done, as to support the general verdict.

3. In an action against a railroad company to recover for loss by fire, alleged to have been set by one of its locomotives, this court holds that a special finding of the jury setting forth that there was not sufficient proof to enable it to find at which of two places charged, the fire originated, was not inconsistent with a general verdict against the defendant, and constitutes no ground for setting aside the same.

4. The omission of the word "dangerous" before the word "combustible" from an instruction upon the duty of the railroad company to keep its right of way clear of dry weeds and combustible material, etc., did not in the case presented constitute reversible error.

5. It is proper to strike out of the instructions of a defendant in an action of this character such portion thereof as pretends, but fails, to cover the ground, touching the means and methods a railroad company is bound to adopt for the prevention of damages by fire from locomotives.

6. The appliances in such cases must be the most approved, they must be kept in the best of running order, and the methods and manner of running and handling the engines must be free from negligence on the part of those in charge.

[Opinion filed December 16, 1889.]

IN ERROR to the Circuit Court of Kankakee County; the
Hon. H. J. PILLSBURY, Judge, presiding.

Mr. W. H. LYFORD, for plaintiff in error.

Mr. C. R. STARR, for defendant in error.

LACEY, J. This was an action in case brought by the defendant in error against the plaintiff in error, to recover for loss occasioned by fire, to his buildings, grain, meadow and other personal property, which fire was alleged to have escaped from the locomotive engine of plaintiff in error, by negligence, while operating its railroad. The declaration consists of two counts: first, it charges negligence on the part of the plaintiff in error in not keeping its right of way free from dead grass, dry weeds and other combustible material, etc., by means whereof fire was emitted and thrown from a certain locomotive, and ignited the said grass and weeds and was spread, and was communicated over, and by the same, to and upon said lands of the defendant in error, and his property burned, etc.

The second count charges the negligence to consist in the negligence of plaintiff in error in allowing the fire to escape and be thrown from its locomotive, by which it fell upon defendant in error's lands, outside of the right of way, and ignited the dry grass and weeds, from which fire was communicated to the defendant in error's property, etc., and damages were sustained. The cause was tried by the court and a jury, and resulted in a verdict for plaintiff in error, for \$1,385, and after overruling plaintiff in error's motion for a new trial, the court rendered judgment in favor of the defendant in error for the amount of the verdict.

Several grounds for error are assigned which we will now proceed to notice. The first is, that the court committed error in not allowing to plaintiff in error a continuance upon its affidavit, after the amendment of the declaration. We do not think this ground is at all well taken for apparent reasons.

First, the declaration was only changed by the striking out of it the claim for burning "a barn" and inserting "one shed on east side of barn, 14 x 40 feet, and pig-shed 8 x 16 feet." The barn had been insured by defendant in error before the shed on the east side was built, and after the fire, was paid for by the insurance company, and the claim assigned to it, and only the shed part was sought to be recovered for in this action, and by the amendment the charge was limited to this.

The affidavit for a continuance is set out in the abstract, and shows that the plaintiff in error had no notice that defendant in error had any such sheds; it had no witnesses in attendance, or that could be brought there at that term of court, to give evidence as to whether they were burned or not, or their value; that by the surprise by the amendment of the declaration it was unprepared to proceed to the trial of said cause at that term of court, and that the affiant believed that if the cause was continued the plaintiff in error would be able to procure evidence before the next term of court; that defendant in error was entitled to no damages by reason of the said alleged burning of said sheds, mentioned in said amendment. The attorney for defendant agreed to admit the said affidavit in evidence under the statute, and the court overruled a motion for continuance.

We think in this there was no error. It is true that under the common law, as it was interpreted in this State prior to the passage of the present statute, on the subject of continuances, it was conclusively presumed that the defendant in any suit was surprised and was unprepared for trial whenever the declaration was amended in any material particular, and the cause had to be continued, if the defendant desired it, at the plaintiff's costs. But our present statute has wisely changed this most absurd rule of the common law, and refuses to allow a continuance except good cause is shown therefor by affidavit as in ordinary cases. Of course the amendment and its nature should be taken into account by the court on the question of diligence on the part of the defendant offered in excuse for not having his witnesses or other evidence present.

In this case it is very doubtful whether, under the rule of the common law, prior to the statute there was any material amendment made to the declaration. The barn, according to the original declaration, would naturally embrace the two sheds claimed for, and if so, the amendment of the declaration as to the sheds does not change it, in claiming for the sheds only, as they were claimed for in the original declaration under the general term, barn. The fact that a portion of the property claimed for in the declaration was withdrawn, would not be

a change of the declaration as to that not withdrawn. The lesser is included in the greater.

But the court allowed the affidavit to be read in evidence, and if any error was committed it was not against plaintiff in error. There is nothing in the affidavit or the circumstances to show that the court abused its discretion in not allowing a continuance, if such continuance is claimed outside of the provisions of the statute, on equitable principles. Such application is always directed to the sound discretion of the court. The original declaration showed that the barn was claimed for as a whole, and the plaintiff in error should have prepared itself to contest the value of every part of it. We can not see how any actual surprise could come to plaintiff in error under the circumstances.

At plaintiff in error's request the jury was required by the court and did find a number of special verdicts, and on the grounds of one of these findings it insists that it was the duty of the court below, as it was requested to do, to find in favor of plaintiff in error and give judgment against the defendant in error. This is one of the main points urged here for reversal. The proposition and special finding of the jury was as follows:

1. "Did the fire in question in this case begin on the defendant's right of way, or did it begin in the plaintiff's property?" To this the jury returned the following answer: "No proof of evidence." This answer simply meant that there was no sufficient proof of evidence to enable it to find which of the two the fire commenced on. From the evidence the jury could not find which of the two places the fire originated on. The answer as given was not responsive to the proposition submitted, unless the above interpretation of the verdict is correct. But taking the proposition and the verdict together, which we must do in cases like this, the above interpretation is correct. The jury did not certainly intend to say by the verdict that there was "no proof" that the fire originated either on the right of way or the defendant in error's land. This would have been to squarely contradict the general verdict, which, unless the case was clear, the

court should not find. All parts of the verdict should be reconciled if it reasonably could be, so as to support the general verdict. The jury was unable to find and did not find whether the fire originated on the right of way of defendant in error's land, but found that the fire originated on one of the two spots, which they must have done in view of the general verdict; and then proceeded to find by the general verdict that the plaintiff in error was guilty in manner and form charged in the two counts of the declaration.

Now it is manifest that if the other evidence in the case would support the verdict of the jury as to the plaintiff in error's liability on each of the two counts, provided the fire originated as charged in each, then it is entirely immaterial as to which of the places charged in the declaration the jury found the fire originated, provided it found it originated in the one or the other. But the jury found that the fire originated on both, hence the verdict that there was no evidence—which must be taken to mean there was no more evidence as to the one than the other. We think that the evidence fully justified the jury in finding that dangerous, combustible material was allowed to remain on defendant's right of way, and hence it would follow under the statute (Sec. 63, Chap. 114, 2 S. & C. Am. St. 1933), the plaintiff in error would be liable if the fire originated there.

There is more doubt in our minds under the first count of the declaration. In case of the fire originating outside the right of way on the defendant in error's land, the evidence must, taken together, show that the plaintiff in error was somehow negligent in allowing the fire to escape; either that the necessary spark arrester was not fit, that it was out of order, or the running of the engine was not properly done, or by some other carelessness the sparks escaped. The jury found by their special verdict, that the appliances for preventing the escape of sparks was not in good order at the time the fire escaped; now we think that the jury was justified in so finding. In the first place the statute provides, that in case of the setting of fire by a locomotive engine in running a railroad train, negligence shall be presumed *prima facie*.

Though, in order to rebut this presumption, the plaintiff in error produced evidence tending to show that the appliances for arresting sparks was the best, that it was in good order and well handled, yet the undisputed evidence was that engine 73, that set the fire in question as it approached the spot where the fire was set on defendant in error's premises, set on fire nearly every farm through which it passed, for at least three miles, and in some instances in several places. Now we think that the jury was justified in finding, as against plaintiff in error's evidence, that this engine was very unsafe at the time and badly out of order. As the fire either originated inside or outside the right of way, which the evidence overwhelmingly establishes, and as the evidence is fully sufficient to establish right to recover as to the other essential facts, we see no reason why the general verdict should be set aside on account of anything found in the first special verdict.

No difference where the jury had located the starting of the fire—the verdict should have been the same, provided it found the essential facts in each count in favor of defendant in error, which, under the peculiar circumstances of this case we are satisfied the jury did, and in fact, in order to support the verdict we are bound to so believe.

The jury especially found the other disputed facts under either count in favor of defendant in error; under the first, that the appliances for arresting sparks were out of repair when the fire was allowed to escape, and under the second, that the plaintiff in error allowed dangerous, combustible material to remain on the right of way at the time the fire was started; in other words, it "was only partially cleared away." The evidence was ample to sustain the verdict, and the point of plaintiff in error in that particular is not well taken.

The defendant in error's instruction to the jury, that it was the duty of plaintiff in error to keep the right of way clear of dry weeds and combustible material, etc., and not inserting the word *dangerous* before the word *combustible*, as provided in the statute, we think, under the evidence and circumstances in this case, could not be harmful, and was not calculated to mislead. The evidence only shows dan-

gerous, combustible material in the right of way, if any, and the jury found that the dead grass and dried weeds were only partially cleared off. The court did not err in striking out the following words from plaintiff in error's instruction No. 10, as follows:

"If the defendant has proven by competent evidence that it used the best and most approved means and methods for preventing damages by fire from its locomotives, such proof is sufficient to overcome said *prima facie* case of negligence" (as made by the statute in case the setting of fire is shown).

This is an attempt to induce the court to instruct the jury, that from the bare proof of certain facts that are not conclusive and do not cover the entire ground, the statutory *prima facie* case is overcome.

The instruction was drawn on the hypothesis that it was only necessary for a railroad to use the most approved means and methods for the prevention of damages by fire by locomotives. This alone was not sufficient. The means, that is, the appliances, must not only be the most approved, but must be kept in the best of running order, and the methods must not only be the most approved, but manner of running and handling the engines must be free from negligence on the part of those in charge.

It is seen, then, that the instructions, by omitting these essentials, entirely fail to cover the ground, and the court was correct in striking out this entire portion of the instruction.

Seeing no error in the record the judgment is affirmed.

Judgment affirmed.

32 580
65 519

JONAS P. MAGNUSSON

v.

JOHN A. CHARLSON, IMPLEADED, ETC.,

Mortgages—Bill to Have Title Declared an Equitable Mortgage—Petition to Intervene—Reversal—Res Adjudicata—Evidence—Stipulation—Decree—Costs.

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1. The petition of a mortgagee, in a mortgage executed *pendente lite* by the complainant, in an action brought to have defendant's title declared an equitable mortgage, the mortgagee being complainant's solicitor, for the right to intervene, the petition having been filed after issues joined and the report of the master filed, was properly dismissed by the court below.

2. Upon the reversal of a decree by this court and the remanding of the case to the court below without directions, it is only bound by the law as determined by this court, and as to such matters of fact, passed upon by this court, as were not changed upon the rehearing by additional evidence, and to that extent only can the case be said to be *res adjudicata*.

3. It is unnecessary for this court to pass upon the admissibility of evidence admitted by the chancellor upon the hearing before him, a court of equity being presumed to determine cases upon *competent* evidence alone.

4. In the case presented this court holds, that it was proper to require the complainant to pay into court within thirty days the amount found to be due to defendant; that the requirement was supported by the stipulation under which the accounting was had, and that as complainant was seeking to redeem from an alleged equitable mortgage he must be regarded in equity as bringing the amount due into court.

5. The question of costs is largely in the discretion of the chancellor hearing the cause, and in the present case that discretion was properly exercised.

[Opinion filed December 16, 1889.]

IN ERROR to the Circuit Court of Bureau County; the Hon. FRANCIS GOODSPEED, Judge, presiding.

Mr. WILLIAM DAVIS, for plaintiff in error.

Mr. A. R. MOCK, for defendant in error.

UPTON, P. J. On the 10th of June, 1874, the plaintiff in error filed his bill in equity against John A. Charlson, the defendant in error, and others, in the Circuit Court of Henry County, the scope and object of which was to have the court declare the title by which the defendant in error, Charlson, held eighty-six acres of land in that county and particularly described in the bill an equitable mortgage, with a prayer for leave to redeem, and for an accounting between himself and defendant in error Charlson, whom he alleged had long been in possession and receipt of the rents, issues and profits

thereof. The original case was before this court at the May term, 1881, and was then given careful consideration, and many of the points now presented were then passed upon. For results then arrived at, and views then entertained, we refer to the opinion then filed, which will be found reported in 9 Ill. App. 194. A restatement further of the original case is therefore deemed unnecessary.

The decree then before us was reversed and the cause remanded. Upon being redocketed in the Circuit Court it was retried on the same evidence in substance, with additional evidence heard upon the retrial.

Upon redocketing the suit in the Circuit Court the plaintiff in error by leave of court filed a supplemental bill in which he sets out the stipulation of August 31, 1874, which is recited in full in the opinion of this court in 9 Ill. App. *supra*, and states that before that stipulation was executed, Charlson, the defendant in error, claimed the eighty-six acres in question as his own, and that plaintiff in error claimed to be entitled to redeem, and to a conveyance from Charlson, and after setting out the order of reference in the original case, the master's report, the interlocutory decree of 13th December, 1875, the final decree dismissing the bill, the appeal to this court, the reversal of the decree below in this court, and the remand of the cause to the Circuit Court, etc., claims that Charlson, defendant in error, was indebted to plaintiff in error for the rents of the lands in question from 1876 to 1881, inclusive, and which it is alleged defendant in error had received, and for the years 1876 to 1882 inclusive, for what rent could and ought to have been obtained as rent therefor, but for wilful neglect of defendant in error asks an accounting therefor; and after averring the insolvency of defendant in error, alleges the intent of defendant in error to sell, transfer or mortgage the land in question to some one ignorant of rights of plaintiff in error thereto, or that he intends to pull down or destroy the buildings thereon standing, unless restrained by the court for so doing, and concludes with the averment that the defendant in error, Charlson, holds the legal title to the land in question as trustee for the plaintiff in error, in equity;

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that the equitable title is in the plaintiff in error, and that he is entitled to a deed thereof from Charlson. Prayer for an accounting for rents and profits and all matters in difference between defendant and plaintiff in error; that the land be conveyed to him—and for an injunction preventing incumbrances or waste, and for general relief, to which supplemental bill Charlson filed answer. Johnson and Stackhouse upon filing a disclaimer were dismissed from the suit; exceptions were then filed to the answer of Charlson, which exceptions were overruled and exception taken thereto. Replication to the answer was filed and the cause was referred to Millchrist, a notary, as special commissioner, to take testimony for both parties and report the same to the court. The commission having taken the proof and filed the same in the court below, the master in chancery as directed therefrom, stated an account between the parties, and filed the same, from which it appeared that there was due from the plaintiff in error, Magnusson, to the defendant in error, Charlson, on the 1st day of July, 1883, the sum of \$1,478.01, to which report and finding of the master both plaintiff and defendant in error excepted, and filed their exceptions in writing in the court below at the December term, 1883.

On the 13th day of December, 1883, after the filing of the said report of the master, William Davis filed in the court below his petition for leave to intervene and interplead in this cause, claiming such right in his petition by virtue of a certain mortgage deed upon the land in question, made and executed by the plaintiff in error to the petitioner, William Davis, on December 1, 1881, to secure to Davis a note of even date with said mortgage for \$2,000, and seeking to re-open and re-investigate matters already heard and determined in the suit, and claiming priority under such mortgage, to any decree to which the court below might render in favor of defendant in error, Charlson, on the report of the master then on file.

This mortgage to Davis was made and executed long after the stipulation of August 31, 1874, was entered of record in this suit, of which Davis, then acting as solicitor for plaintiff

in error, as shown by the record, must have had notice, in which it was stipulated between plaintiff and defendant in error "That if in the accounting (contemplated by such stipulation) anything should be found due Charlson, such sum should be chargeable on the land," etc. On motion of defendant in error filed in the court below, that court ordered the said petition stricken from its files, to which ruling Davis excepted, and brings his writ of error on the same record filed by the plaintiff in error in the case, and errors are assigned in that behalf.

The ruling of the court below in refusing to allow Davis to intervene, we think, was correct. Whatever rights Davis obtained by the deed of mortgage from plaintiff in error as against Charlson, were entirely dependent upon the result of the litigation then pending, in which Davis was acting as solicitor for plaintiff in error, and all evidence which could have been given in the case made by the petition for the right to interplead was admissible under the issues joined in the original suit, which had at the time of filing such petition been closed on both sides, and the report of the master filed, except it might have informed the court of the existence of the Davis mortgage.

Besides, whatever rights Davis acquired under the mortgage were certainly acquired pending the litigation as to Magnusson's rights and interest in the land sought to be mortgaged, and if in that litigation it should be determined Magnusson had no rights or interest in the land, certainly Davis could acquire nothing by his mortgage. Of this litigation, its scope and consequences, Davis was fully apprised. In taking the mortgage "*pendente lite*" Davis was a mere volunteer, and in the case at bar had nothing to protect, for Magnusson had no interest in the land to convey by mortgage or otherwise. *Durand v. Lord*, 115 Ill. 614; *Herrington v. McCollum*, 73 Ill. 476, and cases therein cited.

On the 24th of March, 1884, on further hearing of the parties, the master in chancery made and filed an additional report as to receipts and expenditures by Charlson, itemized

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and filed in the court below, from which it was found that on the 21st of March, 1884, there was due and owing from the plaintiff in error, Magnusson, to defendant in error, Charlson, \$1,472.79, to which exceptions were filed and overruled, and exceptions taken; and on the 22d of March the reports of the master were by the court below approved and confirmed, and a final decree was entered in the cause, that the amount so found by the master on statement of accounts be paid by Magnusson, plaintiff in error, to defendant in error, Charlson, with interest thereon at six per cent, or deposited with the clerk of the court subject to the order of Charlson, within thirty days from that date, and in default thereof that the original and supplemental bills be dismissed, and that plaintiff in error pay all the costs of the suit. The case was brought to this court by writ of error, and is before us for review of the errors assigned upon the record.

The first point to which our attention is called is the contention of plaintiff in error that all matters involved in this litigation which occurred prior to the rendition of the former decree, 13th December, 1875, are "*res adjudicata*." We can not assent to that proposition. The case was reversed and remanded without directions, and the Circuit Court upon that remand was only bound by the law as there determined, and to such matters of fact as were not changed by additional evidence, and to that extent only. Chickering v. Failes, 29 Ill. 301; Cable v. Ellis, 120 Ill. 138; Quayle v. Guild, 91 Ill. 384.

It is further contended that the trial court erred in admitting Charlson's "Exhibit A," and in the overruling of motion to suppress his deposition. Regarding the admissibility of evidence in a court of equity on hearing before the chancellor, little need be said further than this, that a court of equity determines the case only upon the competent evidence, and from that alone, and it is no more difficult to determine what is competent when admitted, than to determine the same thing upon rejection; besides, in the case at bar, neither the exhibit nor the deposition could have changed the result.

The \$150 allowed for money paid to Johnson for his share

of the rent of 1872 was allowed on new evidence, and appears to us to be fully supported thereby. Charlson charged himself with the entire crop for that year. The \$200 note given by Charlson to Johnson as difference in value between the two eighty-acre tracts of land, which Magnusson got the benefit of, was properly allowed, as we held before, and no new evidence has been taken on that point. The claim of Magnusson for \$26 for broom-corn press was, as we think, properly rejected, as was intimated on the former hearing. The allowance upon the basis of actual receipts of rents and profits for the years 1875 to 1884 was correct, as was before held. The rent of 1884 should not be allowed; it was in evidence that the renting season commenced about March 1st, and only twenty days of that year had elapsed, and no rent had or could then have accrued. The expense account, aggregating \$739.34, was the same as allowed when the case was here before, and, as we find no additional evidence in regard thereto to change the views then expressed, we think it was properly allowed.

The fact that Charlson stated, as claimed, that the one-half of this expense amount was his, being true, in no way disproves the claim that Charlson paid Johnson the same amount for his half of expenses.

There was allowed the plaintiff in error in the accounting all the receipts for rents and profits of the land in question, which Charlson ever obtained in cash or crops, and if Johnson paid any part of the expenses Charlson had to account to him for what he so paid. Charlson got the entire crops and has fully accounted for the same, and we see no force in the suggestion made. The statute of limitations did not apply; it was a *running* account and in litigation.

The item of \$14 on broom corn was correct and was properly allowed. The improvements charged were properly allowed as necessary and *proper* repairs. It was also proper to allow the \$1,650, being the one-half part of the Price mortgage, and the interest thereon to February 1, 1867, according to the face of the note. Charlson was compelled to take up the note from the holder, by purchase or payment, to protect

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his own title and interest, and he should be allowed for what he actually paid in so doing, and interest according to the terms of the note which he was thus compelled to purchase. *Condict v. Flown*, 106 Ill. 105.

We are of the opinion that the answer of Charlson to the supplemental bill was sufficient, and that the exceptions thereto were properly overruled. It is absurd to say that Charlson paid the note secured by the Price mortgage and intended it as a gift to the plaintiff in error. The rejection of the lease and trust deed could make no difference, and were properly rejected; they proved nothing in the case in favor of the plaintiff in error.

It is contended, with great persistency, that the court below erred in requiring the amount found due from the plaintiff in error, \$1,472.29, to be paid in thirty days, and several cases determined by the Supreme Court in this State have been pressed upon our attention as decisive upon this question, and most certainly are so, if applicable to the case before us.

In *Magnusson v. Johnson*, 73 Ill. 156, it was held that the same arrangement and transaction for which this suit is brought, did not create the relation of mortgagor and mortgagee, and was not an equitable mortgage, and that Magnusson had no right to redeem, nor interest in the land under the contract.

It will be seen on examination of the stipulation of August 31, 1874, *by virtue of which alone this accounting was had*, that it was expressly provided, "that in case it should be found on such accounting that anything is due from complainant (Magnusson) to Charlson, that in confirmation of such report of the master a decree be entered requiring complainant to pay the amount so found due *on a day named by the court*, and on default of such payment that the complainant's (Magnusson's) bill be dismissed," etc., and that the complainant be "forever barred," etc. Besides, as to Magnusson he certainly ought not to be heard to complain of the time given in the decree for the payment of the account there found due, as he was seeking by this proceeding to redeem the land from a claimed equitable mortgage, and consequently must be regarded in

equity as bringing the amount which should be so found due into court, and tendering the same when so ascertained. Therefore, as to him, no length of time need be given.

The decree was in strict accord with the spirit and meaning of the stipulation. At the time of its rendition the Supreme Court had expressly determined that Magnusson had no right of redemption as mortgagor or interest otherwise in the land in question. It surely can not be contended that the stipulation gave to Magnusson any right to or interest in the land he did not before possess, for the stipulation expressly provides that all questions relating to the title to the land are excepted from its operation.

It is conceded the law is, in this State, that decrees in chancery directing the sale of real estate for the non-payment of money should give at least ninety days (in analogy to the return day of an execution to law) for the payment, in cases *when there is no right of redemption from such sale*, as in cases of strict foreclosure or bills to redeem. All the cases cited by plaintiff in error go to that extent and that only. What analogy exists between the class of cases cited and the one at bar, we are unable to perceive.

The predicate of the cases cited is, and its application is limited to that class of cases, where a party would be cast in his estate by a sale, by operation of law. In the case at bar not only is there no sale of the estate, but at the time of the rendition of the decree below there *was no estate of the plaintiff in error to sell*, either legal or equitable, in the premises in controversy. It is true that at the time of the making the stipulation of Aug. 31, 1874, it was contemplated that plaintiff in error, Magnusson, might have some interest therein; and to determine that question a suit was then pending in the Supreme Court (Magnusson v. Johnson, *supra*) which was decided adverse to the plaintiff in error, Magnusson, some time after making the stipulation. Hence, both parties in view of these facts, expressly stipulated that the question of Magnusson's rights or title to this land should in no manner be inquired into or involved in the suit at bar.

We think, therefore, that the court below committed no

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error upon that point. It is further insisted that the court below erred in requiring Magnusson to pay all the costs incurred in the case. The question of costs is so largely within the discretion of the chancellor hearing the cause that Appellate Courts rarely interfere under our practice, and after a careful examination of this entire record we are unable to say that this discretion has not been properly exercised in this regard and that the ruling was correct.

We find no error in this record which, in our judgment, should justify us in interfering with the decree entered therein and that decree is affirmed.

Decree affirmed.

JAMES H. JOHNSTON
v.
NELSON FLETCHER, CONSERVATOR, ETC.

*Trusts—Conservator—Insane Person—Dealings with Trust Property
—Purchase of Outstanding Title.*

Moneys advanced by a trustee to purchase an outstanding title of property in which the *cestui que trust* has an equitable interest, will be treated in equity as so much advanced for the benefit of the *cestui que trust*, the trustee having a lien on the property until reimbursed for the advancement, and he must account for all profits arising out of the transaction.

[Opinion filed December 16, 1889.]

IN ERROR to the Circuit Court of Carroll County; the Hon. JOHN D. CRABTREE, Judge, presiding.

This was a bill in chancery, filed in the Circuit Court of Carroll County, to the March term thereof, A. D. 1886, by Nelson Fletcher, as conservator of one Robert Croom, against James H. Johnston, plaintiff in error.

The bill alleges that James H. Johnston, the plaintiff in error, defendant therein, was on or about the 7th day of July,

1880, duly appointed conservator of the person and estate of Robert Croom by the County Court of Carroll County, a jury in that court having declared that Croom was an insane person, unfit to have the management of his own property and affairs; that Johnston gave bonds, took the oath required and entered upon the discharge of his duties as such conservator, and remained conservator of that estate until the October term, A. D. 1885, of the Carroll County Court, when he was removed. That the complainant, Nelson Fletcher, was appointed conservator of that estate on or about the 22d day of July, 1886, as successor to James H. Johnston, and qualified and entered upon his duties as conservator of the estate.

That at the time defendant, Johnston, was appointed conservator of the estate of Robert Croom, Croom was in possession of the northeast quarter of the northwest quarter of section thirty-four (34), in township twenty-three (23), range five (5), east of the 4th P. M., in Carroll county, claiming an equitable interest therein and title thereto; that a suit was then pending in the Circuit Court of Carroll County, on the chancery side thereof, in the name and on the behalf of said Robert Croom, to set aside sundry conveyances of the land above described, on the ground of fraud and circumvention practiced upon him by one Orr F. Woodruff, in obtaining a certain mortgage for \$500, out of which arose the subsequent conveyances of the land. That such suit was proceeding to a hearing and trial with a good prospect of overthrowing the Woodruff mortgage and all titles which had accrued and grown out of the same in the various assignees and grantees of Orr F. Woodruff; that instead of contesting that suit on behalf of his ward (Robert Croom), James H. Johnston, with full knowledge and notice of all the irregularities and frauds practiced by the defendants in the above mentioned suits to wrong, cheat and defraud Croom out of the land, and having been active in advising said Croom to commence that suit, suddenly paid R. S. Ely, who claimed to have the title of that land (and one of the defendants in the suit), the sum of \$700 in full settlement and compromise of all matters involved in the suit and took to himself an absolute title to the land by a proper conveyance duly recorded.

Complainant charges that the \$700 which the defendant paid to said Ely was considerably less than the actual value of the land at that time; that Ely sold the land for that price partly because of the relation he, Johnston, sustained to Croom, and for a further consideration that the defendant, as conservator of Croom, would dismiss the above mentioned suit, which was dismissed accordingly; that the conveyance of the land to Johnston was on or about the 5th day of January, A. D. 1881, and soon thereafter the defendant took possession of the land and received the rents and profits of the same for four consecutive years, and on or about the 18th day of February, 1885, sold and conveyed the land to one Samuel Senneff for the sum of \$1,560; and although in procuring the land and title thereto from Ely, he used his own money to pay the consideration of \$700, he is chargeable with and ought to account as conservator and trustee of the estate of Robert Croom not only for the rents and profits of the land while in his possession, but for the amount received for the sale of the land, less the money and interest which he invested in it, and reasonable expenses and compensation for his trouble. That Johnston has never paid any of the rents or profits arising from the use, occupancy or sale of the land to the orator or to the estate of Robert Croom, or to any one else, but to wrong, cheat and defraud the estate claims that he bought it in his own right and refuses to account for the same, etc.; prays that an account may be taken of what is now due and owing from Johnston to the estate of Robert Croom, on the sale of the land, and that an account may also be taken of the rents and profits received by the defendant, or by any other person in his behalf, or which, without his wilful neglect, might have been received by him since he entered into the possession of the premises, and that he be compelled to pay over the same, etc., and for general relief.

To this bill, the defendant, James H. Johnston, filed his answer, admitting his appointment and that acting as such conservator he purchased the land in the bill described for the sum of \$700 and obtained title to himself, as charged; admitting that the value of the land at the time of such

purchase was considerable more than the price paid by him therefor, but insisting that as he purchased in his own right and paid his own money he should be protected, etc.

He further admits his knowledge of the pendency of the chancery suit regarding the title to the land of Croom at the time of his appointment as such conservator, and the nature, object and purpose of said bill; that answer was filed thereto; that at the next term of the court in which such proceedings were pending after the purchase of his ward's land by Johnston, the said bill was dismissed; admits that he sold this land to Senneff for \$1,560, as charged in the bill, but denies substantially the other charges therein.

To this answer a replication being filed, the cause was heard on the bill, answer, replication and proofs taken and heard before the chancellor, and an interlocutory decree entered in which the court finds that the title to the land in the bill described was held by James H. Johnston, as trustee for Robt. Croom, for whom he was then acting as conservator, and that whatever profits he derived from the rents, issues and profits thereof and the moneys received from the subsequent sale thereof, as charged in the bill, belonged in equity to Robert Croom, his ward, and that the allegations in the bill were true in substance and effect, and ordered the cause to be referred to the master in chancery to take an account of what was equitably due and owing from the defendant, James H. Johnston, to the complainant. In stating such account the master was directed to charge Johnston with the rents and profits received by him during the time said land was in his possession and control, and with the amount he received upon the sale of said lands from Senneff, \$1,560, and that the master credit Johnston with the \$700 which he paid for the title, and with all taxes paid out of his own means while he was in possession of the land, as well as attorney's fees and expenses paid by the defendant of his own means upon the chancery suit, which he, as conservator of Robt. Croom, dismissed out of court in January, 1881, and for prosecuting the suit against Joseph T. Bell, to set aside the tax title on the lands of Croom, his ward. That the master

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in stating the account compute interest at six per cent per annum upon all items which enter into such account on both sides from the date of payment or the receipt of money to the first day of the then next ensuing term of the said Carroll County Circuit Court, as shown by the testimony taken or to be taken; that either party have leave to offer further testimony as to any and all items of payments or receipts which properly enter into such statement of accounts, and also what would be a reasonable sum to be paid for defendant's services, etc.

Pursuant to this interlocutory decree, the master, to whom the cause was referred on the first day of the next ensuing term of that court, being the 19th day of November, A. D. 1888, in strict pursuance of the directions contained in the interlocutory decree, made and filed in court an account stated and itemized between the parties, together with the additional proofs taken and heard before him, and the stipulations and agreements of the parties, in which the master found to be due and owing from James H. Johnston, as such former conservator of Robert Croom, to Nelson Fletcher, the present conservator of said Croom, as such conservator, the sum of \$816.57, which report and the findings of the master the court fully approved and confirmed, and on the 30th day of November, 1888, entered a final decree therein, directing the payment of the sum so found to be due by Johnston, within thirty days from the date of that decree, with interest thereon at six per cent therefrom until paid, and that Johnston pay all the costs of the proceeding and suit, and in default that complainant have execution therefor. To which final and interlocutory decrees Johnston, defendant, excepted, and the case is now brought to this court by a writ of error, and errors are assigned upon the record.

Mr. JAMES M. HUNTER, for plaintiff in error.

Mr. C. B. SMITH, for defendant in error.

UPTON, P. J. The allegations of the bill are fully sustained by the evidence in every particular, and in addition thereto

the evidence shows that on the next day after Johnston obtained a deed of the land from Ely, Johnston went to the county seat and dismissed the chancery proceeding set out in the bill of complaint without consultation with the solicitors who were conducting the suit in the interest of Croom.

It seems that Croom was residing upon this land in the year 1881, with his family, and his cows, horses, hogs, and having other personal estate with which he was supporting his family comfortably, keeping them together. But as soon as Johnston got fairly invested with the title to the land he proceeds to take possession of all Croom's personal estate, even the hog which was then being prepared for the family use for food; sells the same at public auction, scatters the Croom family, and notwithstanding Johnston admits that the land was worth much more than what he paid to redeem it, at least \$700 or \$800 more, and the personal property sold at auction was appraised and estimated as to the value of some \$562.50, all of which Johnston had in his hands and possession, he removed the old man Croom to the county poor house as a pauper. There does not appear to have been the slightest necessity or excuse even, for this heartless conduct. A more culpable and apparently fraudulent transaction can scarcely be imagined, than is shown by the facts in this record. The law is too well established and settled to require note or comment, further than to say, that trustees are never allowed to deal in the property intrusted to their care, or to make a profit therefrom. Whatever use is made of it by the trustee, if profit is derived, it is for the benefit of the beneficiary, and the trustee must account for it, no matter what form the transaction may assume.

While the trust continues unperformed, the trustee will not be permitted to purchase the property as a stranger might do, and in the dealings of the trustee with the property held in trust the burden rests upon the trustee to show the fairness of such dealings. Moneys advanced by a trustee to purchase in an outstanding title, will be treated in equity as so much advanced for the benefit of the beneficiary, and not for the benefit of the trustee, giving the trustee a lien on the

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property until reimbursed for the advancement. Ward v. Armstrong, 84 Ill. 151; King v. Cushman, 41 Ill. 31.

The decree of the court below was eminently just and proper, and could not upon any principle of justice and equity have been different, and it is affirmed in this court.

Decree affirmed.

F. S. MURPHY

v.

MATTHIAS LOOS.

Costs—Taxation of—Mandate of Supreme Court—Construction—Discretion—Personal Reflections in Argument upon Party to Suit.

Where the Supreme Court reverses a decree of the Circuit Court, and the judgment of this court, affirming the same, and remands the case with instructions as to the decree to be entered, but the mandate is silent as to costs, it will be presumed that the Supreme Court intended the chancellor to exercise his discretion therein.

[Opinion filed December 16, 1889.]

APPEAL from the Circuit Court of Knox County; the Hon. S. S. PAGE, Judge, presiding.

Mr. F. S. MURPHY, *pro se*.

Mr. A. M. BROWN, for appellee.

The costs are in the discretion of the court. Field v. Openstein, 93 Ill. 68; Morrison v. Morrison, 11 Ill. App. 605.

And the discretion ordinarily will not be interfered with or reviewed. Askew v. Springer, 111 Ill. 662; Moore v. The People, 108 Ill. 484; Howe v. Hutchinson, 105 Ill. 501.

C. B. SMITH, J. This is an appeal from the Circuit Court of Knox County, calling in question a decree of that court upon the single question of the taxation of costs.

This suit has been pending in the various courts for a number of years. It was first tried in the Circuit Court, and appealed from there by appellant to the Appellate Court of the Second District, and the decree of the Circuit Court there affirmed, and was again appealed from there to the Supreme Court by appellant, where the judgments of the Circuit and Appellate Courts were reversed, and a modified decree directed to be entered by the Circuit Court. The case is reported in *Murphy v. Loos*, 104 Ill. 514, where a full statement of the facts will be found, which are not important to be recited here in order to a correct understanding of this controversy. It appears the original decree of the Circuit Court, among other things, requires Murphy to pay all the costs.

The Supreme Court, in its opinion in deciding the case on appeal, among other things, used this language: "The decree of the Circuit Court is, in our judgment, right in all respects except in the amount of money Murphy is required to pay Loos, and except as to costs."

The court then directs what the decree below shall be in respect to what Murphy shall be required to pay Loos, but gives the court no direction as to whom it shall tax the costs, nor makes any further reference to the taxation of costs, except as above stated in the opinion.

The case was remanded to the Circuit Court and then again heard, and a decree rendered according to the directions of the Supreme Court (or if not, no objections are made), except as it related to the taxation of costs, and in that respect appellant contends that the decree is not in compliance with the directions of the Supreme Court. The Circuit Court again taxed all the costs except about \$4.50 to appellant, which aggregate about \$125. Appellant complains of this part of the decree and brings the case here and insists on a reversal.

It will be observed that the Supreme Court makes no direct order, nor gives the Circuit Court any directions concerning the costs on a rehearing. At most that court expressed a dissatisfaction with the first decree upon that point. In its opinion, it directs the Circuit Court as to the nature of its future decree in respect to everything except the costs, which

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is left open. We must assume that if the Supreme Court had intended that the Circuit Court should relieve Murphy from the costs it would have said so, and that by its refusal or failure to make any direct order in that regard it intended to leave the Circuit Court free to exercise its discretion in that respect in conformity with the usual practice of courts of equity.

It is the well settled and uniform practice of the courts of this State to tax costs in all chancery cases according to their discretion and as justice and good conscience seem to require in each particular case, and this discretion will rarely be disturbed unless the court can see that the chancellor has abused his discretion, or has manifestly erred in its exercise, resulting in hardship or oppression to the party complaining. We are, therefore, of opinion that in the absence of a direct order from the Supreme Court, or what would be equivalent to such order to the Circuit Court, as to what disposition it should make concerning the costs, that the Supreme Court thereby intended the Circuit Court to exercise its discretion upon that question. This view is much strengthened from the fact that the court gave specific directions as to all other parts of the decree. While we admit the question involved is not entirely free from doubt, yet we do not feel justified in reversing the decree without being fully satisfied that the decree is erroneous.

We would have been much better satisfied with the arguments of counsel for appellee, had all personal reflections and charges against appellant been omitted. They had no necessary place in the argument and could give no assistance in the decision of the question before us, which was simply to construe the order of the Supreme Court.

Personal assaults never add anything to the dignity, character or weight of an argument, nor add favor or weight to the cause of him that used them without necessity.

The decree of the Circuit Court is affirmed.

Decree affirmed.

JOLIET STEEL COMPANY.

V.

BENJAMIN SHIELDS.

*Master and Servant—Personal Injuries—Steel Works—Track Repairer
—Negligence of Servants—Fellow Servant—Special Findings—Pleading
—Evidence—Instructions.*

1. The question whether one servant was the fellow servant of others in the employ of the same master, is for the jury.

2. In an action brought by a servant to recover from his employer for the loss of a leg through the alleged negligence of other servants of his said employer, this court holds, that the declaration after issue joined sufficiently disclosed a cause of action; that plaintiff was not a fellow servant of those through whose negligence the accident occurred; that when injured he was in the exercise of ordinary care; that the instructions given for him were not seriously defective, and declines to interfere with the verdict in his behalf.

[Opinion filed December 16, 1889.]

APPEAL from the Circuit Court of Will County; the Hon. C. BLANCHARD, Judge, presiding.

Messrs. GARNSEY & KNOX, for appellant.

Messrs. HALEY & O'DONNELL, for appellee.

UPTON, P. J. This was an action brought by Benjamin Shields, appellee, against the Joliet Steel Works, appellant, to recover damages for the loss of a leg caused by the falling of a mold, in part filled with a steel ingot, called a "butt," upon his leg, crushing it so that amputation below the knee followed, through the alleged negligence of the appellant's servants. The injury occurred on the 9th of July, 1887, in the converting mill of the appellant corporation.

The works of the appellant company, which is a corporation duly organized, are quite extensive. Different departments of its business operations are carried on in different

buildings situate some distance from each other. The yards of the corporation are traversed by a system of railroad tracks located principally in the yards of the corporation, a portion thereof entering and passing through some of its buildings, in extent measuring about eighteen miles of railway track.

The appellee alleges in his declaration that he was in the employ of the appellant company; that his business was that of a track repairer or foreman of the track-repairing hands or gang engaged in keeping the network of railway tracks in order; that a portion of the appellant's works or mill was called a converter, wherein certain servants of the appellant were engaged in the handling of molds in the process of the manufacture of steel; that it was the duty of the appellant to place such molds in such a position that the same should not be dangerous to other servants of the appellant engaged in repairing the railway tracks within such converter, etc.; that the servants of appellant engaged in such converter so negligently and carelessly placed a certain mold, partly filled, called a "butt," that while appellee was engaged in the performance of his duty in repairing the railway tracks in such converter, etc., using due care, etc., such mold fell upon him and injured him, etc., causing the loss of his leg, etc. The plea was the general issue and joinder therein. The cause was submitted to a jury, who found the issues for appellee and assessed his damages at \$3,000, upon which, after overruling a motion for a new trial, the court below rendered judgment and from which appellant appeals to this court.

In the court below, at the instance of appellant, the jury made a special finding on the facts, to the effect that the appellee was not obliged to act in repairing the railway track in the appellant's converter mill in connection with the employes or foreman of that department wherein such repairs were made; that in placing the "butt" mold which fell, the men employed in the converter mill did not place such mold in the usual and customary manner, nor use ordinary care in so placing it; that the mold was not tested to learn if it was liable to fall in the usual and ordinary way, and that the

test which was made, was not such an one as an ordinarily prudent man carrying on the same business would have made under the same circumstances; that appellee's attention was not called to the unsafe condition of the mold before he commenced work in repairing the railway track, nor could he have seen its condition as well as any other employe in the converter mill, had he examined it; that the mold did not fall by reason of the work that appellee or his gang of track repairers did about it. The following facts may be said to be conceded, at least are established by the evidence and are substantially uncontroverted.

The methods in the converting mill are these: At the north side of the building are the converters in which the steel is made; in front of the converters is the semi-circular casting pit, which is perhaps about two feet below the level of the floor of the building; ranged around the pit, close to its edge, are the molds of iron, square in shape, from forty-two to seventy-two inches in height, tapering slightly from the top to bottom, opened at both ends, weighing from 1,800 to 2,400 pounds; they are placed on a "chair bottom," or "sole," which is slightly hollowed in the center, so that the bottom of the ingot is convex in shape; the molten steel is turned from the converter into a ladle and from the ladle is poured into each mold, until the set of eight molds is full; at times it happens that there is not enough metal to fill the last mold; this is called a "butt;" so soon as the metal has chilled enough in the mold to retain its shape, the molds are drawn off, leaving the ingots standing upright in the pit, and the molds are placed on one side to cool. At times the mold will not "strip" and the ingot sticks in them when hoisted by the crane; they are then raised and jarred—"sledged"—to get the ingot out; if it does not come, the mold and ingot are set one side, in front of the empty molds nearest the railroad track so that they may be taken at once to the yard and broken up.

"Butts," stick in the mold as well as full ingots, and this is a daily occurrence. After the molds are set off to cool they are usually tested by the men in charge to see if they will stand, by taking hold of them with a long iron hook and try-

ing to pull them over. If they stand firmly they are considered safe; if they fall they are safe, of course.

At the east end of this converting mill is a rail bed (so called) about twenty feet square, composed of railroad iron, upon which the molds are set, and they are set at other places around the converter, the floor of which is sand. There are five narrow gauge tracks running into and through this converting mill, and the north track at the east side, being the one nearest this rail bed, needed repairs, and on Wednesday preceding the Saturday upon which the injury occurred appellee was directed to repair that track at the earliest possible moment, on the ensuing Saturday, if he could.

On that Saturday afternoon, when the last heat (or the last one but one) in that converter mill, on the east side of the pit, was taken off, and the molds swung to the rail bed to cool, in one of the molds was a "butt" from twenty to twenty-eight inches long which stuck in the bottom of the mold, and this was set on the sand floor in front of the rail bed nearest to the rail track which was directed to be repaired (for convenience in removing the same into the yard, if necessary, to be "sledged" or broken up).

This "butt" or mold was about eighteen inches square at the bottom, about sixty-two inches in height, would weigh about 2,000 pounds empty, and was easier to tip over when filled than when empty.

It was left standing on the sand floor, about two feet from the rail track which appellee was directed to repair. About a half hour after the mold was so placed, the workmen and the employes in the converter mill, having ceased work for the day and gone therefrom, appellee with his force of repairers came into the converter and proceeded to take up a rail on the track nearest this "butt" or mold, as required, and in so doing the mold fell upon his leg, inflicting the injury for which this suit is brought.

Appellant contends: 1st. That the declaration filed in the case at bar does not state a cause of action. The declaration simply avers that the injury complained of was caused by the negligence of appellant's servants, and avers, also, that

appellee was a servant of appellant, but does not disclose whether the appellee and the other servants whose asserted negligent acts caused the injury complained of were fellow servants or co-servants, co-associated in such way as to exonerate the appellant from liability for such other servants' negligent acts in case of damages caused thereby.

No demurrer was interposed to the declaration, but issue was taken thereon, and hence every intendment must be taken in favor of its sufficiency, especially after verdict.

We think the declaration after issue joined was sufficient to disclose a cause of action, if the evidence should show all the elements necessary to a recovery. The declaration avers a duty on the part of appellant, its neglect is stated, and an injury resulting from that neglect of duty is also averred. This in substance makes out a case. That appellee was not a fellow servant co-associated with him in such way as to exonerate appellant from liability for the negligent acts of its other servants, may reasonably be inferred, and especially after the special findings of the jury in their verdict rendered in this case before stated. *Mechanicsburg v. Meredith*, 54 Ill. 84; *Smith v. Conway*, 16 Ill. 147.

In this view the trial court did not err in refusing to exclude from the jury, on appellant's motion, the evidence offered by the appellee in that court on the hearing.

The question whether the appellee was or was not a fellow servant with those engaged in the converter mill of appellant so as to render it liable for their negligent acts, as well as the question whether the evidence sustains that verdict, were questions of fact for the jury. *C. & N. W. Ry. Co. v. Moranda*, 108 Ill. 576; *C. & E. Ill. R. R. Co. v. Geary*, 110 Ill. 383; *C. & A. Ry. Co. v. Kelly*, 21 N. E. 203.

After a careful examination of that evidence, we are unable to say that the jury was not justified under the rules of law in rendering that verdict and the special findings thereof for the appellee.

The evidence does not disclose so clear a case of co-association in their employments between the appellee and the other employes of the appellant in the converter mill, whose neg-

ligence caused the injury complained of, as that we are able to say that the appellee failed to make out a case against the appellant. Indeed, we think the evidence justified the findings of the jury under the rules of law.

Complaint is also made of appellee's instruction numbered two, given by the trial court.

We have examined that instruction with some care, and in our judgment it announces substantially the correct rule of law in this State upon the question of fellow servants. It contains the true hypothesis of association to create or avoid liability, upon the doctrine of *respondet superior*, and states the rule firmly established in this State upon that subject, as laid down in the Moranda, Geary and Kelly cases, above cited. The fact that this instruction refers to the appellee as belonging to a "gang of track laborers," when he was in fact a foreman thereof, could make no difference. If the instruction was not as full as it might have been it was substantially the law, and with the very full and favorable instruction given on the part of the appellant, we think the jury could not have been misled in their investigations or findings in this case. The other instructions given for the appellee, of which complaint is made, seem to have been framed upon the allegation of the second count of the declaration. These instructions also contain the legal and correct hypothesis of co-laborers in the same association, or fellow servants, in this State, as stated in the cases before referred to.

Upon a careful examination we think the evidence fairly shows that the appellee was in the exercise of ordinary care. He was not apprised in any manner of the fact that the standing mold contained an ingot or was a "butt" mold, which made it liable to fall over, and he had no reason to suspect that such was the fact, and in this used ordinary care. If the mold had been empty, under the evidence, it would not have fallen or occasioned the injury complained of. If it had been filled, appellee could have seen that it was so and have avoided the danger. The fact is fully established that an empty mold placed as this "butt" mold was, in the sand, would stand so firmly as to require two or more men to pull

it over; while a "butt" mold, or one filled or partly filled with steel, in consequence of the concavity of its base, could be easily overthrown. Under the evidence it seems to us, that the appellee had the right, and he was justified in regarding the mold as an empty one, and to so conduct himself in the discharge of his duties as an employe of the appellant in the repair of the railway track, as he had been directed to do.

It does not follow because the appellee did not have the mold removed as offered, that he knew of the danger, or had any information of the actual condition of the mold. It can not be supposed appellee would knowingly put in peril life or limb, neither does it follow that the appellee assumed all risks in not requiring its removal. It is abundantly manifest that the appellee did not suspect its dangerous condition. We have carefully examined this record, and we find no error, in our judgment, sufficient to authorize a reversal of the judgment of the Circuit Court, and that judgment is, therefore, affirmed.

Judgment affirmed.

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EVA E. ARMS, ADM'X, ETC.,

V.

THE CITY OF KNOXVILLE.

Municipal Corporations—Personal Injuries—Bursting of Cannon in Street—Pleading—Negligence—Responsibility of City.

1. In a declaration, in an action against a city to recover damages for the death of a person killed by the bursting of a cannon in a public street, the allegation that the defendant did knowingly, wrongfully and negligently *permit*, etc., etc., will, taken in connection with the rest of the declaration, be construed to mean that the permission charged was the failure of the city to interfere and stop the acts complained of and not a *positive permission* given in advance.

2. The negligence of police or peace officers in failing to stop the firing of a cannon, known to be dangerous, upon the streets of a city, does not render the city liable to the administratrix of a person killed as the result of such negligence.

[Opinion filed December 18, 1889.]

IN ERROR to the Circuit Court of Knox County; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. McKENZIE & WOOD, for plaintiff in error.

The motion in arrest should not have been allowed so long as the declaration set out the substance of a sufficient cause of action, and contained no patent intrinsic defect of substance. *Evans v. Lohr*, 2 Scam. 511; *Culver v. Third National Bank*, 64 Ill. 528; *Jones v. People*, 53 Ill. 366; *Commercial Ins. Co. v. Treasury Bank*, 61 Ill. 433.

The cases cited by defendant in error in support of his claim, that the words of the declaration must be construed most strongly against the pleader and most favorably to the defendant, and that the charge in the declaration that defendant "knowingly, wrongfully and negligently did permit," can only be construed as charging that defendant did not prevent, the court will notice were not construed after verdict and upon motion in arrest, but were construed upon demurrer. See *Maenner v. Carroll*, 46 Maryland, 215; *Robinson v. Greenville*, 42 Ohio St. 625.

The law is that upon motion in arrest, a party making such motion, by so doing confesses that the plaintiff has sustained his declaration by all proof of which his case is susceptible under his declaration.

Before verdict the rule is somewhat strict against the pleader. After verdict every intendment is in favor of the verdict and of the pleading under which it is obtained. Under such principles the intendment in this case is, there was express license alleged and proven. The defendant in error admits that in such case the city is liable. A city in the management of corporate property must be held to the same responsibilities that attach to individuals for injury to the property (of course life and limb) of others. *Chicago v. Brennan*, 65 Ill. 160; *Nevins v. City of Peoria*, 41 Ill. 502; *City of Joliet v. Harwood*, 86 Ill. 110; *City of Joliet v. Seward*, 86 Ill. 402; 99 Ill. 267; *Stanley v. City of Davenport*, 54 Ia. 465; *Rushville v. Adams*, 107 Ind. 476; *Chicago v. Hoy*, 75 Ill. 530.

The defendant in error cites upon the merits five cases only.

Of these *Lafayette v. Timberlake*, 88 Ind. 330, and *Falkner v. City of Aurora*, 85 Ind. 130, hold a city is not liable for not preventing coasting. In *Falkner v. Aurora*, the court puts its decision upon this ground: The sport in which they (the coasters) were engaged was not necessarily a nuisance; it might have been carried on innocently. See also *Hutchinson v. Concord*, 41 Vt. 271; *Burford v. Grand Rapids*, 53 Mich. 98.

Of the five cases cited by defendant in error upon the merits the two coasting cases are inapplicable. The case of *Robinson v. Greenville*, 42 O. St. 625, passed off on demurrer, but it declares cannon firing in the streets an intolerable nuisance, and suggests that if actively permitted or licensed the city would be liable.

A city is bound to prevent a nuisance in its streets, rendering the same unsafe or insecure, if it can do so by ordinary and reasonable care and diligence. *Taylor v. Cumberland*, 64 Md. 68.

Ball v. Town of Woodbine, 61 Iowa, 85, went off, upon demurrer. The gravamen of the charge was the failure to prevent a violation of an ordinance, not that "the town knowingly, wrongfully and negligently permitted the needless and dangerous firing."

As for the case of *Norristown v. Fitzpatrick*, 94 Penn. St. 121, the plaintiff in error will not fear its effect. The Supreme Court of Pennsylvania is not among that class of courts that, while in the minority, seem to hold the safer and more sensible rule upon the question of municipal liability. *Nevins v. City of Peoria*, 41 Ill. 502.

MR. FREDERICK A. WILLOUGHBY, for defendant in error.

URTON, P. J. This was an action commenced in the Knox County Circuit Court by the plaintiff in error, as administratrix of the estate of Henry W. Arms, deceased, against the defendant in error, for the alleged knowing, wrongful and negligent permitting of divers persons to assemble on its streets, and fire a piece of cast iron bored out as a cannon,

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which was dangerous to life and limb of the passer by, as is alleged, and by means of which firing the cannon burst when so fired and a fragment thereof struck and killed Henry W. Arms, plaintiff in error's intestate, while he was lawfully upon the street and in the exercise of due and proper care and caution as is alleged. Plea of the general issue and trial by a jury who found a verdict for plaintiff in error for \$2,300. A motion in arrest of judgment was interposed which the court sustained. The case comes here on writ of error, and the only question presented by the record before us is, whether the declaration sets out substantially a cause of action.

It will be seen upon examination of the plaintiff's amended declaration as set out in the record, that the only allegations of culpability of defendant in error are contained in the third and fifth paragraphs thereof. The third alleges that the defendant did "knowingly, wrongfully and negligently permit divers persons * * * to carelessly, dangerously, needlessly, and to the danger of life and limb * * * load and fire a piece of cast iron bored out as a cannon * * * which said cannon * * * loaded and fired as aforesaid was dangerous to life and limb * * * all of which defendant well knew," etc. This paragraph wholly fails to disclose the character of the "permission" charged, whether active, (*i. e.*) given in advance of the firing complained of by actual consent, or whether it consisted in mere passiveness or non-interference with the firing while going on. In the preceding clause of the declaration it is alleged that it was the duty of the defendant in error "to prevent the use in the street of * * * all deadly and dangerous machinery," etc., which would indicate that the pleader intended to charge a failure to suppress, rather than a previous consent given, and the phrase, "negligently permit," contained in the third paragraph of the declaration which we are now considering would further indicate such meaning was intended; which would be entirely consistent with the use of the word "permit," as defined by lexicographers, *i. e.*, "not to prohibit or prevent."

Again, the well known rule that the allegations of the

pleader are to be taken most strongly against himself, would seem to justify the construction that the "*permission*" charged in the declaration consisted in the negligent failure of the city to interfere with and stop the firing complained of. Such construction would seem justified by the authorities. In *Robinson v. Greenville*, 42 Ohio St. 625, it was held that notwithstanding the common rule that pleadings must be construed most strongly against the pleader, has been abrogated in that State, still in an action against a municipal corporation to recover damages for injuries sustained from the discharge of a cannon in a public street, an allegation in the petition that the authorities of the corporation "had negligently and carelessly given permission to such persons to fire the cannon," may be construed in view of the whole pleading, as an allegation that the authorities took no steps to prevent such firing.

In *Maenner v. Carroll*, 46 Md. 215, the court say: "Here the allegation is not that the defendants cut the excavation and left it in a condition dangerous to persons passing along the highway, but that they '*permitted*' others to do so. How permitted? The sufficiency of this allegation turns upon the word '*permitted*.'"

"In what particular sense it was used by the pleader is not altogether certain. It may be for aught that appears on the face of these counts that the defendants permitted the excavation by their mere silence and failure to interfere, or by not taking active measures to prohibit the making of the excavation over the lot and across the highway. When there is want of certainty in the allegation of a pleading, the general rule is that the sense of the averment is to be taken most strongly against the pleader (Chit. Pl. 237, 238), and giving to the defendant the benefit of this rule, the counts under consideration fail to state a sufficient cause of action."

The fifth paragraph of the declaration, which we will now consider, avers that "the said Henry W. Arms was then and there lawfully upon the street in the said city of Knoxville, and was exercising due care and caution, and was not negligent; but that the failure to '*remove*' the said nuisance and dangerous cannon firing from the public streets was negligence

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upon the part of the defendant, *and by reason of such negligence* upon defendant's part the said Henry W. Arms lost his life." It would seem evident from this averment, that the negligence of the city for which this action is brought was the failure of the city to stop the cannon firing, not a previous permission to fire it. We conclude, therefore, that the negligence alleged in the declaration and herein complained of, whereof the intestate lost his life, was the negligence of the city in not stopping or preventing the firing of the cannon.

If we are correct in this conclusion, it follows that the cause of action as set forth in the declaration amounts to this: that the police or peace officers of the city of Knoxville were remiss in duty and therefore guilty of negligence in not stopping the firing of cannon upon the streets of that city, which such officers knew to be dangerous to life and limb; for it must, we think, be conceded that a municipal corporation can act only through its proper officers. This presents the question whether such negligence on the part of its police or peace officers can furnish a ground of private action against the city; in other words, is the neglect of the peace or police officers of the city of Knoxville to put a stop to the dangerous breach of the peace here complained of, a matter for which the city is liable in damages?

In *Oliver v. Worcester*, 102 Mass. 489, Justice Gray, speaking for the court, says: "The distinction is well established between the responsibilities of towns and cities for acts done in their public capacity in the discharge of duties imposed upon them by the legislature for the public benefit, and for acts done in what may be called their *private character*, as the management of property and rights held by them for their own immediate profit or advantage as a corporation, although incurring, of course, ultimately to the benefit of the public."

In the one case no private action lies unless it be expressly given; in the other there is an implied or common law liability for the negligence of the officers in the discharge of such duties. *Dillon, Mun. Cor.*, Vol. 1, Secs. 10, 11, 39 and notes; *Oliver v. Worcester*, 102 Mass. 489; *Detroit v. Cony*, 9 Mich.

igan, 165; Dillon, *Mun. Cor.*, Vol. 2, Secs. 761, 778, 779, and notes to cases cited.

The same principle is announced in the *President and Trustees of Town of Odell v. Schroeder*, 58 Ill. 353, where it is held that a municipal corporation is not liable for the illegal and unauthorized acts of its officers in enforcing an ordinance public in its character.

In *Wilcox v. The City of Chicago*, 107 Ill. 334, it was held that cities are not liable for the negligent acts of the officers or men employed in the fire department of that city whilst in the discharge of their duties; that the members of that department although appointed by and holding office at the pleasure of the corporation are not the agents and servants of the city, for whose conduct it is liable, but they act rather as the officers of the city charged with a *public service*, for whose *negligence* in the discharge of official duty no action lies against the city without being expressly given. Citing Dillon on *Municipal Corporations*, and numerous other cases determined in New York, Massachusetts, Connecticut, Iowa, Mississippi, Ohio, Pennsylvania and California, in support of the text.

It has been held repeatedly by most eminent authority that police officers are not agents or servants of the corporations appointing them, within the rule making the corporation answerable for their acts. *Shearman and Redfield on Negligence*, 3d Ed. Sec. 139, and cases cited; *Kimball v. Boston*, 1 Allen, 417; *Butterick v. Lowell*, 1 Allen, 172, wherein it is said police officers can in no sense be regarded as agents or servants of the city. Their appointment is devolved upon the cities and towns by the legislature, but this does not render such cities and towns liable for their unlawful or negligent acts; same point, *Elliott v. Philadelphia*, 7 Phil. 128.

A municipal corporation is not liable for the non-feasance or misfeasance of the officers of its police. *Stewart v. New Orleans*, La. Ann. 461; *Lewis v. New Orleans*, 12 La. Ann. 190; *Dargon v. Mobile*, 31 Ala. (Ms.) 469; *Wheeler v. Cincinnati*, 19 Ohio St. 19; *Hafford v. New Bedford*, 82 Mass. 297; *Culver v. City of Streator*, determined in the Appellate Court. Second District, filed June 28, 1889.

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For failure to exercise governmental power cities are not liable. *City of Lafayette v. Timberlake*, 88 Ind. 330, wherein it is said the municipality *had fully discharged its duty in making the streets safe*, and it was only made unsafe by *law breakers* who used it in a manner prohibited by law. The wrong was not in the city but in those who improperly and wrongfully used the street. See, also, *Faulkner v. City of Aurora*, 85 Ind. 130.

We perceive no difference in principle in exempting municipalities from liabilities for negligence in not preventing dangerous coasting upon the public street, that would *not be alike applicable* to dangerous cannon firing upon the street, and upon this precise question the Supreme Courts of Ohio and Pennsylvania have passed. In *Norristown v. Fitzpatrick*, 94 Penn. St. 121, the plaintiff was injured by the discharge of a cannon in the public street, fired about 9 o'clock p. m. by a crowd upon the pavement of the street, while a public officer of the city was present, making no effort to prevent the firing, and the city was held not liable, citing many of the leading authorities bearing upon the question here under consideration. See, also, *Elliott v. The City*, 25 P. F. Smith (N. Y.), 347. In *Robinson v. Greenville*, 42 Ohio St. 625, which was a case of cannon firing in the public street, the authorities having notice of such firing, took no steps to prevent it and the court held the city not liable.

In *Ball v. Town of Woodbine*, 6 Iowa, 83, which was an action against the corporation of Woodbine by a person injured by fireworks, fired upon the public streets of said corporation in violation of its ordinances, the officers of the town having knowledge of such firing and neglecting to stop it, the corporation was held not liable. We must hold with the Circuit Court that the declaration shows no cause of action against defendant in error, and the judgment of the Circuit Court is affirmed.

Judgment affirmed.

82	612
118	1486

J. R. MURPHY, FOR USE, ETC.

V.

THE CONSOLIDATED TANK LINE COMPANY.

Garnishment—Parties—Nominal Plaintiff—Appeal.

1. The nominal plaintiff in a garnishee proceeding before a justice of the peace is a party to the suit, and has the right of appeal from the judgment rendered by the justice. Such plaintiff has also the right to appeal to this court from an order of the Circuit Court dismissing his appeal.

2. Where a party makes an effort to perfect his appeal from the judgment of a justice of the peace and files some sort of a bond, the same can not be dismissed because of imperfections in the bond until a rule has first been entered on the appellant to file a good one.

[Opinion filed December 16, 1889.]

IN ERROR to the Circuit Court of Peoria County; the Hon. S. S. PAGE, Judge, presiding.

Mr. GEORGE B. FOSTER, for the plaintiff in error.

MESSRS. SHEEN & LOVETT, for defendant in error.

C. B. SMITH, J. Patrick Walsh brought a suit before a justice of the peace against J. R. Murphy, appellant, upon some kind of a demand, and recovered a judgment before the justice. An execution was issued upon this judgment against Murphy and returned, "no property found." Thereupon Walsh instituted garnishee proceedings against "The Consolidated Tank Line Company," alleging that it was indebted to Murphy and a subpoena was issued against it in the usual form, when it appeared before the justice and made answer that it was indebted to Murphy in about the sum of \$85, but in addition thereto stated in its answer that Murphy was a married man, the head of a family, and entitled to a \$50 exemption. Thereupon the justice allowed this \$50 exemption, and gave judgment in favor of Murphy for the use of Walsh against the tank line company for \$35.

Murphy v. Consolidated Tank Line Co.

Murphy had no notice of these garnishee proceedings, was not subpoenaed nor present at the trial, but before the expiration of the twenty days he ascertained what had taken place before the justice in the garnishee proceeding, and in that case he took an appeal to the Circuit Court of Peoria County. The case was properly certified by the justice on appeal. In the Circuit Court Patrick Walsh moved to dismiss the appeal on several grounds: 1. Because no appeal will lie in favor of a nominal plaintiff in garnishee proceedings. 2. No appeal was taken from the judgment against the tank line company. 3. No appeal bond was given to indemnify Walsh. 4. No appeal bond has been given to the garnishees. The appeal bond filed with the justice is not abstracted, and we can not tell to whom it was given and under our rule will not search the record to find that fact.

The court sustained this motion but for what reason the abstract does not state. Counsel for plaintiff in error informs us in his argument that the court sustained the motion and dismissed the appeal for the sole reason (as appears from the bill of exceptions, as he says) "that said Murphy had no right to take said appeal and was not a party to the suit."

From this order dismissing the appeal, appellant Murphy then prayed an appeal to this court, which said prayer or appeal the court also refused. Proper exceptions were taken to this action of the court. Murphy being denied the right of appeal now brings the case here on writ of error and insists that all the proceedings of the Circuit Court were erroneous. In this contention he is clearly right and the court erred in dismissing his appeal from the justice and also in denying him the right of appeal to this court.

Murphy was a party defendant to the suit in the original proceeding of Walsh against him. He was also not only in form but in substance and in fact a party plaintiff for the use of Walsh against the tank line company in the garnishee proceeding. In that proceeding his claims and legal rights against the tank line company were to be litigated. The amount the tank line company owed him was to be determined and a judgment to be rendered in his favor against the tank

line company for the amount it owed him, if anything. The tank line had a right to be heard in proof and a right to deny any or all or partial liability, and to set up any defense, good or bad, to Murphy's claim against it. Murphy had a right to meet these defenses and had a right to show that a much greater sum was due him than the tank line company was willing to admit. In other words a garnishee proceeding between a judgment debtor and his debtors for the use of the judgment creditor is simply nothing more nor less than an ordinary real law suit with three interested parties instead of two.

We think it very clear that Murphy was a party to the garnishee proceedings, and that he had a right to be present and protect his interests. Every man must have his day in court when his life, liberty or property is in jeopardy in a judicial tribunal. And being a party he had a right to an appeal to the Circuit Court under Sec. 28 of the Garnishee Act, Rev. Stat., 1228 (Starr & Curtis).

It was error, therefore, to dismiss this appeal for the reason assigned; and the other grounds named in the motion upon which it is argued the appeal was properly dismissed, are equally untenable. An appeal bond of some kind was given to the judgment creditor or the garnishee, but we are not informed to which nor are we able to see from the abstract that the bond was not properly given; but even if it was wrongly given and to the wrong party or wrong in any other respect, it was error to dismiss the appeal without first taking a rule against Murphy to file a good bond. Sec. 69, Chap. 79, Rev. Stat. (Starr & Curtis, p. 1456).

Under our statute and liberal practice (intended to promote the ends of justice), where a party desiring an appeal makes an effort to give a bond and does give some kind of a bond, though imperfect, he shall not lose his right of appeal if he will give a good bond within a reasonable time after being required to do so by a rule of court.

It was also most palpable error to refuse plaintiff in error the right of an appeal from the judgment of the Circuit Court. This right is expressly given by Sec. 28, Chap. 37, p. 702, Rev.

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Stat. (Starr & Curtis). This right of appeal does not depend on whether the judgment of the Circuit Court is right or wrong nor upon the humor of the presiding judge, but upon a plain statute of the State, and no court has any right to deprive litigants of the right to have their cases reviewed by the Appellate Court when that right is conferred by statute. The judgment of the Circuit Court is reversed and the cause remanded.

The erroneous action of the court having been procured on the motion of Patrick Walsh the costs of this writ of error will be taxed to him.

Reversed and remanded.

JOHN H. CREAGER ET AL.

V.

WILLIAM BLANK.

Practice—Waiver of Opening Argument—Instructions:

1. Where plaintiff's counsel waives the opening argument and the defendant's counsel thereupon waives argument, it is proper for the court to refuse plaintiff's counsel the right to address the jury.
2. Where one question in issue was as to the terms of a contract of sale of tread power and stave cutter, the court, upon the case as presented, properly refused to instruct the jury that any statement made by one of the contracting parties after the sale, would not bind him nor affect the validity of the original contract.

[Opinion filed December 16, 1889.]

APPEAL from the Circuit Court of Du Page County; the Hon. C. W. UPTON, Judge, presiding.

Messrs. E. H. GARY and G. W. BROWN, for appellants.

Messrs. BOTSFORD & WAYNE, for appellee.

LACEY, J. This suit was brought by the appellants against

the appellee to recover the price of a certain stock cutter tread power machine, called a "Gray tread power" stave cutter, claimed to have been sold by the appellants to the appellee for the sum of \$222. On the trial, which was had before the court and a jury, the contention was on the part of the appellee, that he only took the machine on trial to purchase it if it suited him, and, after giving it a trial, it did not suit him, and that he offered to return the machine, which the appellants refused to accept. On the other hand, the appellants insisted and attempted to establish that the sale was absolute if it worked as well as the machine of the same kind sold to Barber, and that appellee had no power under the contract of sale to return the machine if it worked as well as Barber's, which it is claimed it did. This matter of fact at issue before the jury was sharply contested, and in support of the appellants' contention, appellant Creager testified fully in support of his side, corroborated more or less clearly by Henry Barber, the owner of the other machine, who was present at the sale, Charles B. Gorham, Ed. McFarland, Wm. Hensel, and the other appellant, Bartholomew.

On the side of the defense were the appellee and his son, who was a man grown, twenty-six years of age, who contradicted the appellant Creager and his witnesses as to the terms of the contract and testified to it as insisted on by appellee. The defense was corroborated by the witnesses J. A. Keeley, Fred Grant and Wm. Phillips.

The jury decided in favor of the appellee, on the evidence, and we can not hold, after a review of the entire evidence, that the verdict was so manifestly against its weight as to require a reversal. We therefore decline to reverse on the ground that the verdict was contrary to the evidence.

At the close of the evidence the counsel for appellants announced to the court that he waived the opening argument in the case. The defendant's counsel then insisted that if appellants waived the opening argument, the appellee could waive any argument, and the case should go to the jury without argument. The court then held that the appellants' counsel could proceed with the argument, if they desired,

Creager v. Blank.

with the right of defendant's counsel to follow and appellants' counsel to close the argument, but appellants' counsel waived the opening argument, and defendant's counsel waived argument, and appellants' counsel then asked leave of the court to make closing argument, which the court refused, to which ruling of the court the counsel for appellants excepted. This action of the court is now assigned here for error; we do not think the assignment is well taken. The two principal arguments having been voluntarily waived, there was nothing left for the counsel for appellants to reply to. The purpose of a reply argument is to explain or refute anything that may have been erroneously said or improperly argued by defendant's counsel. Its office is simply that of a reply, and it would not be proper for the counsel for appellants to argue the case in chief in a reply argument. It has been the uniform practice in the Circuit Courts of this State, so far as we are advised, to refuse a reply argument where the argument in chief and the defendant's reply have been waived. The court also took the precaution to fully inform the appellants' counsel what the ruling would be before he waived the argument in chief, so that there can be no claim of surprise. The ruling of the court, as we think, was correct.

One other cause for error is assigned, and that is the refusal of the court to instruct the jury on the part of appellants that "any statement of Creager, if made subsequently to the time the bargain was concluded, that he would make the cutter and power satisfactory to the defendant, would not bind the plaintiffs, nor affect the validity of the original contract."

Without some explanation it would have been improper to give the above instruction. While it is true, as a matter of law, that a mere statement by one of the contracting parties, after the making of the contract, out of the presence of the other party, and to an indifferent person, would not of itself have the effect to change the contract already made, yet it may have been exceedingly strong evidence in the minds of the jury, as showing what the original contract in fact was, and, no doubt, it was the purpose of the appellee to corrob-

rate his own testimony by these admissions on the part of one of the plaintiffs. The instruction as offered was well calculated to mislead the jury and induce it to discard for all purposes the admissions of Creager, alluded to. The latter part of the instruction, which reads, "nor affect the validity of the original contract," has an apparent assumption in it that the contract made was as the appellants contended, which was the very question at issue. The instruction refused was well calculated to impress the jury with the idea that the evidence, as it bore on the question at issue, had no effect and should be discarded.

The court committed no error in refusing it. Perceiving no error in the record, the judgment is affirmed.

Judgment affirmed.

Judge Upton, having tried the case below, took no part in the decision here.

22 618
59 639

DAVID FEY

v.

THE PEORIA WATCH COMPANY.

Corporations—Attempted Release by Directors of Stock Subscription—Ultra Vires—Other Subscriptions—Delay—Estoppel—Interest—Directors Not Necessarily Stockholders—Subscription Paper Not Necessary to Show Organization—Calls.

1. The attempted release by the directors of a corporation, of one subscriber to the capital stock from the payment of his subscription, does not release another subscriber, not agreeing to such attempted release, from such payment.

2. A subscriber to the capital stock of a corporation who claims to be released from his subscription by reason of fraudulent inducement used in securing the same, must claim his release at the earliest possible moment.

3. The installments of a subscription to the capital stock of a corporation draw interest from the date when they become due.

4. In the absence of statutory requirement to the contrary a director of a corporation need not necessarily be a stockholder.

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5. In the case presented, this court holds that the corporation plaintiff having been organized and having received its charter, the introduction of the subscription paper was unnecessary to show organization.

[Opinion filed December 16, 1889.]

APPEAL from the Circuit Court of Peoria County; the Hon. S. S. PAGE, Judge, presiding.

Mr. ARTHUR KEITHLEY, for appellant.

From a somewhat extensive research I have been able to find but two cases in this State, where, as between the corporation itself and the subscribers to its stock, the question of the validity of a release by its board of directors of some of the subscribers, has undergone judicial inquiry; one of these cases was in the Appellate Court, the other having been incidentally presented to, but directly decided by our Supreme Court.

In *Ratz v. The Esler & Ropiequet Mfg. Co.*, 3 Ill. App. 83, the plaintiff brought suit on a subscription to its capital stock by defendant. The general issue was filed and with it a stipulation of the parties that all defenses might be shown under that plea. The plaintiff's books were introduced in evidence which showed that at a meeting of the board of directors of plaintiff therein "a resolution was passed authorizing an agreement with certain subscribers to the capital stock, by which, upon giving their individual notes for one-half of their subscriptions they were to be released from the payment of the other half."

The court in its decision says: "The courts of this country, with but few exceptions, have held that a release of a portion of the subscribers to the capital stock releases all the subscribers who do not assent to that release, or in some way give their sanction to it." * * * "It destroyed that equality that exists between subscribers according to the terms of their subscriptions, which is the very essence of their contract," and for that reason alone the court in the case cited reversed the judgment of the trial court allowing a recovery and remanded the cause.

The facts in that case being the same under the pleadings as in this, that judgment, we think, should be decisive of this.

Our State Supreme Court within the last eighteen months, in the case of *Bouton v. Dement et al.*, 123 Ill. 142, had occasion to pass upon the question here presented. Dement and others, policy holders in a certain insurance company which was in financial distress, brought a bill in equity against the insurance company and some of the subscribers to its stock, in the nature of a bill of discovery. Cole, the assignee of the insurance company, filed a cross-bill, alleging that Bouton had not paid for his stock. Bouton answering, says in substance that he had among other things given his note for the stock, and that by some internal re-arrangement of the company's affairs, a note of trifling value was given to the company in lieu of the Bouton note and Bouton's note was returned to him. The finding of the Circuit Court, which was affirmed in the Supreme Court was, that Bouton's note stood in place of his liability for that stock; that Bouton was a director and a member of the finance committee of the insurance company; that there were suspicious circumstances attending the after-dealing with the Bouton note tending to show it to have been a device to get rid of Bouton's personal responsibility upon the note; that Page, whose note was substituted for Bouton's, was an employe of Bouton, and financially irresponsible, and that Page's note was accepted by the insurance company in lieu of Bouton's, and was, after having passed through two or three different hands, purchased by Bouton for three-twentieths of the face value of his own note.

The court held that as between Dement, a creditor of the corporation, and Bouton, the transaction was a fraud, and Bouton was still liable upon his stock; but as to the assignee, Cole, he was not entitled to recover anything. Using the language of the court, "the exchange of Bouton's note for that of Page, and the cancellation and delivery up of Bouton's note, being valid and binding on the insurance company, as we find, the company itself could not impeach the transaction

and set it aside, and no more, we think, could the assignee of the insurance company do so. The company, by its assignment, conveyed no greater right in respect of its property, than the company itself possessed."

In Angell & Ames on Corporations, tenth edition, Sec. 531, there is contained this concise statement: "And if a stock company lets off a part of its subscribers, and returns them their money, other subscribers not consenting thereto are discharged from all liability growing out of their original subscriptions."

The case of Memphis R. R. Co. v. Sullivan, 57 Ga. 241, after deciding that all of the stock of which the road was capitalized should be fully subscribed before action brought, says: "It surely can not alter the case if a large and material subscription were merely nominal, and was afterward released because it had always been a sham, and all this had been done without the knowledge and consent of the subscriber, who was thus duped and cheated into his subscription by the sham."

The Supreme Court of Iowa has rendered a valuable decision for appellant upon this point, valuable in anticipation of the argument of appellee. I refer to the case of Gelpeke, Winslow & Co. v. Blake, 19 Iowa, 263. This was an action brought primarily to collect a subscription to the capital stock of a railroad company. The defendant pleaded as one of his defenses that he had been released from all liability on his subscription, his money paid returned to him, his contract of subscription canceled.

The court said that this plea was demurred to because it failed to state that the cancellation and release alleged therein were made with the consent of the creditors and stockholders of said company. The point suggested is unsound, and can not be supported. That there are creditors is mere assumption. It does not so appear from the face of the plea. * * * As respects the assent of the stockholders to make the rescission of the contract valid, this is necessarily implied in the language of the plea. The allegation is, that it was the company that canceled the contract and released the defendant

Who, in law, constitutes the company, if it be not the stockholders? The distinction which the demurrant would make between them, derives no support from the authorities cited.

There was no lack of power, therefore, in the company, nor do we think there would have been in the board of directors, to rescind the contract, with or without the consent of the stockholders or others, when it was done in good faith; it would be time enough for the courts to take care of the creditors when they were judicially advised by the pleadings or evidence in the cause, that the same were in jeopardy.

The Pittsburgh & Connellsville R. R. Co. brought suit in Pennsylvania to collect a subscription to its capital stock after a lapse of some time, and after some of the stockholders had been released. The Supreme Court of that State, speaking through Judge Woodward, 32 Pa. St., on page 31, says: "McCully's undertaking was not only to the company, but with the other subscribers. His subscription and theirs were mutual consideration for each other, and to let them off and hold him is to enforce a contract he never made, * * * and when the company let off part of its subscribers and returned to them their money without the consent of the defendant, actual or implied, they discharged him from all liability growing out of his original subscription.

On page 141 of the same volume there is another decision announcing substantially the same principle. See also *Miller v. Second Jefferson Building Association*, 50 Pa. St. 32.

There are numerous other decisions touching somewhat remotely upon the question here presented, which it is not advisable to cite, as the foregoing clearly show how the various courts have been impressed when confronted with such facts as are contained in the record of the case at bar.

No doubt appellee will cite many authorities, for many there are, including Morawetz on Private Corporations, showing that a release of the stockholder by the board of directors is *ultra vires*; but when those cases are examined it will be found that those releases are being complained of by somebody affected thereby, rather than the corporation itself.

Messrs. JACK & TICHENOR, for appellee.

Shorn of all verbiage, the pleas claim that because some one, not named, by some authority, not stated, released certain other subscribers from their liability without any consideration whatever, then the defendant should be released from his liability. Each plea, upon its face, shows that the alleged release was *nudum pactum*, and therefore void. Consequently that the alleged fraudulent subscriptions upon which the defendant relied are binding and of full effect against the subscribers, notwithstanding the alleged release. "The reason is obvious; the agreement of discharge is without consideration." *Hayes et al. v. Insurance Co.*, 125 Ill. 639. It would seem as though no argument should be necessary upon the proposition that a defense based upon an alleged agreement which was not only without consideration, but *ultra vires*, will not be entertained; and we should submit the question upon this simple proposition, were it not that the Appellate Court of the Fourth District seems to have sanctioned the defense in *Rutz v. E. & R. Manufacturing Co.*, 3 Ill. App. 83. In this case Judge Allen says: "The courts of this country, with but few exceptions, have held that a release of a portion of the subscribers to the capital stock, releases all the subscribers who do not assent to that release, or in some way give their sanction to it," citing Angell & Ames on Corporations, and some Pennsylvania and New York authorities cited by the author of that work in support of his text.

The language of the text may be correct in principle; but it necessarily involves certain well recognized principles: first, that the release must be founded upon some legal consideration, and second, it must be granted by some competent authority; otherwise it is no release. In the Pennsylvania cases cited by Angell and Ames, and by Judge Allen, the railroad companies, already organized, had opened their books for subscriptions to their capital stock, and had collected large subscriptions from certain shareholders. Subsequently their projects were abandoned, and the amounts already collected from some of the subscribers had been returned and their subscriptions canceled. It was held under these circumstances that no recovery could be had against other sub-

scribers. The New York cases cited are both cases of voluntary subscriptions to private enterprises, dependent for their consideration entirely upon the mutual obligations of the subscribers to assist in the furtherance of a common undertaking. In all of the cases cited, the subscribers dealt with a power already in existence and competent to receive subscriptions and to control or cancel subsisting obligations. Numerous cases in Pennsylvania draw the distinction between a subscription to the capital stock for the purpose of enabling the company to organize, and a subscription after the company has been organized. Thus it is said: "Where subscriptions are made to the stock of a proposed corporation, *previous to and for the purpose of procuring* a charter, any conditions annexed thereto, whether written or parol, are void. But after the organization of the company a condition is binding and obligatory, subject, however, to the qualification that the rights of co-subscribers are not affected thereby." And again: "The commissioners (to receive subscriptions preparatory to organization) are held to have only limited statutory powers, of which the subscribers are bound to take notice. They have no right to vary the terms of subscriptions, and any conditions are held to be void, as a fraud upon the State, upon corporate creditors and upon other subscribers." *McCarty v. S. & N. B. R. R. Co.*, 87 Pa. St. 332; *Miller v. H. J. & S. R. R. Co.*, *Ib.* 59; *Boyd v. P. B. R. R. Co.*, 90 Pa. St. 169; *Bedford R. R. Co. v. Bowser*, 48 *Ib.* 29.

It is said by a recent text writer: "A subscriber for stock in a corporation can not obtain a cancellation of his subscription, except by the unanimous consent of the other subscribers." *Cook on Stockholders*, Sec. 169.

Conceding that under our statutes a stockholder may be released by the unanimous consent of the other subscribers, it will scarcely be claimed that the other subscribers consenting thereto, can refuse to pay their subscriptions upon the ground that the release was made in fraud of their rights as stockholders. In this respect the case of *Gelpeke et al. v. Blake*, 19 Ia. 263, cited by appellant, fails to sustain his posi-

Fey v. Peoria Watch Co.

tion; for in that case the court recognized the doctrine that a release to be operative must be made with the consent of all the other stockholders of the company. If appellant consented to the release of Cole, he can not avoid his subscription by reason of that release; for Judge Allen says in the Rutz case, the fraudulent release of one subscriber releases all who do not assent thereto.

In *C. & P. R. R. Co. v. Baily*, 24 Vt. 465, the same questions as here, were presented. The court held that the report of the commissioners licensed to open books for subscription, and to hold the preliminary meeting for organization, must be *conclusive* upon the validity of the subscriptions, on the amount thereof, and upon the legal organization of the company, so far as the stockholders are concerned; that one of the purposes of calling the meeting of the stockholders preliminary to organization, is that the commissioners may be enabled to certify that the required amount of stock has been raised.

Concluding then, as we must, that the stock was fully subscribed, and as a logical sequence that all the subscriptions were valid and binding, what is the effect of the alleged subsequent release, without consideration, of one of the subscribers? Manifestly, if without consideration, the release was, for that reason alone, inoperative and void, and the subscription remained valid and binding. But beyond this, if the effect of the release is to reduce or impair the capital stock of the company, or if made without the consent of the remaining stockholders, it must, in order to be valid or effective, be authorized by some statutory authority. No such power or authority is given to the directors, or to any officer or agent of the corporation. It is therefore *ultra vires*; and for this reason, the subscription remains valid and binding notwithstanding the release.

LACEY, J. This was a suit in assumpsit by the appellee against the appellant to recover from the latter the sum of \$1,000 and interest on his subscription to the capital stock of the former, it being a corporation organized for the purpose of carrying on the manufacturing and sale of watches in the

city of Peoria, with a capital stock of \$250,000, consisting of 2,500 shares of \$100 each, with a duration of ninety-nine years. The subscription paper which was signed by appellant bore date December 1, 1885, which he signed for ten shares. This subscription was preparatory to organization, which took place in December, 1885. There was a trial by the court, a jury being waived, and finding and judgment for appellee for \$1,120. The main and chief error assigned and relied upon by appellant for reversal, was the action of the court in sustaining appellee's demurrer to his 4th, 5th, 6th, 7th and 8th pleas, and in not allowing the same defense set up in them to be made on the plea of the general issue. The substance of the special pleas is that the agents of the appellee prior to its organization (those who were obtaining the subscription), preparatory thereto, for the purpose of effecting organization, made a secret agreement with one Johnson Cole, a subscriber to the capital stock of 200 shares, that he should not be called upon to pay the amount of the subscription or any part thereof, and that said subscription so fraudulently written and signed was shown to appellant as genuine, and he subscribed in faith of it, and that the appellee released Cole from the payment of any part of his said subscription in pursuance of the agreement, without the payment of any money; that the release was made of Cole's and other subscriptions without consideration to appellee and with intent to give such released subscribers an unfair advantage. There are other points of defense urged by the appellant, which will be noticed hereafter. The main point of the defense relied on, the supposed release by the directors of the subscription, we will notice first and more at large. Besides the errors assigned as to the sustaining of the demurrer to the pleas, the appellant also claims that the court ruled out certain evidence offered by him tending to show, and in fact showing, that the directors released as far as was in their power, the said Cole from his subscription without consideration.

We will consider both of these assigned errors together as the supposed defenses of appellant are governed by the same principle of law. The appellant, in his brief, disclaims any

intention of insisting that any secret agreement to release, as charged in the plea, made by the parties procuring the subscription of Cole antecedent to or at the time of taking it, would have the effect to release his own. It is admitted that such agreement would not have that effect. It is well to make such admission, for such is the general tenor of all the decisions, and the point was expressly held in *Melvin v. The Lamar Insurance Co.*, 80 Ill. 446. That question being at rest we will not further allude to it in this opinion. The next question arising is, did the release by the directors, so far as it could be done by them, have the effect to release the other subscribers to the capital stock, not agreeing to such release, the appellant among them, from their subscription.

It is most strenuously urged by the appellant that it did, and that in law such action of the directors of a corporation does have that effect. We are referred to the following authorities in support of this doctrine. *Rutz v. The Esler & Ropiequet Mfg. Co.*, 3 Ill. App. 83, in which the court says that "the courts of this country with few exceptions have held that a release of a portion of the subscribers to the capital stock releases all the subscribers who do not assent to that release or in some way give their sanction to it," etc. We are also cited to *Bouton v. Dement*, 123 Ill. 142; also *Gelpcke, Winslow & Co. v. Blake*, 19 Ia. 263; *Angell and Ames on Corporations*, 10th Ed., Sec. 531; and *P. & C. R. R. Co. v. McCarty*, 32 Pa. St. 31; *Miller v. S. J. B. Asso.*, 50 Penn. St. 32. The case of *Rutz v. The E. & R. Mfg. Co.*, 3 Ill. App., *supra*, seems to support the claim, but we are inclined to think the learned judge who wrote the opinion has fallen into error in the statement he makes in regard to the weight of authorities and also the decision. It is not necessary for us to go to other States and other courts to find authority for the doctrine that the releasing of a subscription to the capital stock of a corporation without the consent of the stockholders does not release the other subscribers. We have it in the decisions of our own Supreme Court. In *Melvin v. The Lamar Ins. Co.*, 80 Ill., *supra*, it was expressly held that as against any stockholder not assenting, a subscriber to the capital stock could not

be released from his subscription thereto by action of the directors where such release was made without full payment. In the above case one of the stockholders filed a bill in equity to compel Cushman & Hardin to refund certain money of the company withdrawn by them in pursuance of an agreement between them and the directors without consent of the stockholders, whereby they were released from their subscription to 5,500 shares of their capital stock, and certain money refunded to them which they had paid in on their subscription, and the court held, that notwithstanding such release, they must repay the money and also be compelled to occupy the position of stockholders in reference to their 5,500 shares; that the action of the directors was *ultra vires* and void as to such attempted release. The court in the above case holds that, "each stockholder has a vested right in the contract of subscription of every other stockholder," citing *Chandler v. Brown*, 77 Ill. 335.

In the decision, in making further comments, the court says: "Holding, as we do, that this option to surrender these shares of stock and take back the money and securities was invalid and to be disregarded, as a fraud against the other stockholders, the transaction of the directors of the company in the cancellation of the stock and in the payment of the money and securities, must be held here as of no effect. * * * The authority to collect and distribute does not embrace the power to release without payment. The courts have separately held that an attorney intrusted with a claim for collection has no power to discharge it without payment in full, and that to compromise a claim under such circumstances requires a special authority from the principal. *Nolan v. Jackson*, 16 Ill. 272; *Viking v. McClellan*, 61 Ill. 311."

The court cites the above extract in regard to the duty of an attorney to his client as being analogous to the position of the directors of a corporation in respect to their duties in the collection of the subscription to the capital stock. They, no more than an attorney, can release or give away the assets of the company. They stand in the same relation. The appellant insists that there is a distinction between a stockholder

Fey v. Peoria Watch Co.

asking relief against the acts of the directors in an attempted release of subscription, and a creditor; that as to the former the directors represent them and can release the subscription without consideration, but as to the latter they can not without the consent of the creditors. The case of Bouton v. Dement, 123 Ill. 142, is cited as a case in point, where it was held that the assignee of a corporation could not question the release of a subscription of a certain party which had been fraudulently made by the directors, but that the creditors might. As we understand that decision it was based on the ground that the stockholder had ratified the action of the directors, and as to the assignee of the corporation and the stockholders the release was binding, but not so as to the complaining creditors. The court in that case holds this language: "As the transaction of the substitution of the note of Page in the place of that of Bouton and the cancellation and surrender up of Bouton's note was approved and ratified by the directors and stockholders of the Empire Insurance Company of Wheaton, and the company afterward used the Page note and hypothecated it with a bank to raise money, it is insisted that the transaction was a valid one and binding upon the company. This might be so as to the company, but yet be otherwise as against creditors. We are of the opinion that the transaction above referred to was valid as against the insurance company but not so as against creditors."

It will be seen, then, that the release of the insurance company was put in that case on the ground that the stockholders had ratified the release of the subscriptions to the capital stock.

In the case above cited of *Melvin v. The Lamar Ins. Co.*, 80 Ill., *supra*, the only relief sought was by a stockholder, on the ground that the release of a subscriber to the capital stock by the directors, without consideration and without consent of the stockholders, was void, which claim the court sustained and granted the relief, holding the attempted release *ultra vires*. We find abundance of authority for this ruling of the court in the text books and adjudged cases. In *Morawetz on Private Corporations*, Sec. 117, we find this passage, to wit :

"So if the directors of a corporation attempt to release a portion of the shareholders and cancel their shares, this will not discharge other shareholders from the obligation of their contracts, for such release and cancellation being unauthorized, would not bind the corporation, and would be wholly void." The authorities cited in the note in support of the text are numerous. *Whittlesy v. Frantz*, 74 N. Y. 456; *Jewett v. Valley Ry. Co.*, 34 Ohio St. p. 601; *Agricultural College In. Co. v. Fitzgerald*, 15 Jus. 489; *Compose Remsbon, etc., Plank Road Co. v. Witzel*, 21 Barb. 56; *Phillips v. Covington Bridge Co.*, 2 Metc. (Ky.) 219, 223; *Macon, etc., R. R. Co. v. Vasan*, 57 Ga. 314; *Litle v. O'Brien*, 9 Mass. 423.

We think it would be a dangerous doctrine to hold that the directors of a private corporation could by their wholly unauthorized act release, without the consent of the stockholders, any of its debts, and give away its assets, and still more dangerous and contrary to all the rights of the other stockholders, if by the release of one of its subscribers without consideration, they could dissolve the corporation itself; for the effects of such release might be, that enough of the shareholders would be absolved to entirely dissolve the corporation, to the great detriment of other shareholders. We think the law could never sanction such a rule. It was one or two years after the supposed release of Cole before the bringing of this suit, and hence before this attempt on the part of the appellant to obtain release from his subscription. And we are inclined to think that he should be estopped now from insisting on the defense he makes. He should at once or within a reasonable time, have taken steps to have his subscription canceled, and not wait and speculate on the success or non-success of the enterprise. In *re London & Staffordshire Fire Ins. Co.*, reported in *Chancery Division Law Reports*, 1883, Vol. 24, page 194, it was said a party who claims to be released because of some fraud in inducing him to become a member of an incorporation, must claim his release at the soonest possible moment, and the burden of proof is on him, if much time elapses, to show that he had no notice. "He can not be allowed to play fast and loose, and be a

stockholder if things turn out favorable, and not so, if unfavorable."

Neither in the appellant's pleas nor in his offer to prove the release has any allegation or offer to show that he had no notice of this release of Cole in time to have made his election, whether he would be bound by his subscription or not, been made. Having failed to do so under the authority of the above ruling, he would be presumed to have known about the release of Cole at the time it was done, and not having taken any steps to release himself from the subscription, be bound, even if he could have never claimed a release. See also authorities to the same point. Morawetz on Private Corporations, Sec. 108, and cases cited; Upton v. Treblecock, 91 U. S. 45, and cases cited.

The appellant makes the point that it was error to compute interest on his subscription. We think not. The subscription was a written instrument and under our statute after it became due, as the installments were called for, such installment would draw interest. The last and final installment was called for November 18, 1886, more than two years prior to the date of the judgment in June, 1889.

The objection is made that the directors are not stockholders. We do not understand that such an objection as that could be made in this case, and our statute does not require it, and in the absence of such requirement one not a stockholder may be a director. *Ex parte Stock*, N. J. Chan. 73; *Stahl v. McDaniel*, 21 Ohio St. 354, 367; *Wright v. R. R. Co.*, 117 Mass. 226; *In re Steamboat Co.*, 44 N. J. Law, 529; *Dispatch Line v. Ballamy Mfg. Co.*, 12 N. H. 205.

We can not see what the subscription paper has to do with this case; the company has been organized and received its charter, and it is not necessary to show any subscription paper, to show organization. Besides, appellant in this action can not question the organization. *Rice v. R. R. I. & A. R. R. Co.*, 21 Ill. 93; *Ill. G. T. R. R. Co. v. Cook*, 29 Ill. 237. At least, if the corporation is *de facto*, the burden is on him to rebut by showing want of organization.

The objection raised that the appellant is released because the appellee accepted the subscription of C. M. and E. D. Howard in the Fredonia Watch Company, is not well taken. "A subscriber for stock in a corporation can not defeat an action to collect such subscription by the defense that the directors or corporation itself have done corporate acts which are beyond the corporate powers. There are other remedies open to the subscriber." Cook on Stockholders, Sec. 187; *People v. Barnett*, 91 Ill. 422; *People v. Logan Co.*, 63 Ill. 74. We think the call is sufficient to authorize recovery. They call for payment of all subscriptions except that of E. D. Howard, trustee of the Fredonia Watch Company, which had been settled for in another way. It had been exchanged for the property of the Fredonia Watch Company with Howard, its trustee, and at least *prima facie* Howard had already paid it.

Seeing no error in the record, the judgment is affirmed.

Judgment affirmed.

C. B. SMITH, J., dissents. I do not agree with the reasoning or conclusion reached by a majority of the court. The controversy is between the corporation itself and the defendant. No rights of creditors are involved. The simple question as to whether a corporation can release some of its subscribers to its stock and compel others to pay, is alone presented by this record. I hold they can not. The case of *Edward Rutz v. The Esler & Ropiequet Mfg. Co.*, 3 Ill. App. 83, and the case of *Bonton v. Dement et al.*, 123 Ill. 142, are authority in point against the majority of the court. I think the judgment ought to be reversed.

Plano Mfg. Co. v. Parmenter.

PLANO MANUFACTURING COMPANY

v.

A. M. PARMENTER.

22	633
56	259

Agency—Account Stated or Settlement Sheet—Error—Burden of Proof—Instructions.

In an action brought by a manufacturing company to recover from one of its agents the price of a machine received by him and not accounted for in his settlement sheet, where it appeared by defendant's own admission that he had received a machine not reported in such sheet, the burden was on him to establish his claim that he had *not* received a machine which *was* included in the settlement.

[Opinion filed December 16, 1889.]

APPEAL from the Circuit Court of Lee County ; the Hon. T. M. SHAW, Judge, presiding.

Mr. ARTHUR KEITHLEY, for appellant.

Mr. JOHN M. TENNERY, for appellee.

UPTON, P. J. This suit began in proceedings before a justice to recover the price of a mower claimed by appellant to have been shipped to and received by the appellee under the provision of a written contract between the parties. In the trial before the justice a judgment was rendered for appellee, from which the suit was taken to the Circuit Court by appeal, in which two trials were had, each resulting in a verdict for appellee.

The contract above referred to, so far as material to the determination of the suit before us, provides that appellee was to receive the goods shipped him under the contract by the appellant, pay freight and charges thereon, sell the same and furnish appellant when called upon, after the ensuing harvest, a full and detailed account of the sales so made upon blanks to be furnished him by appellant.

On October 24, 1885, Van Ness, as agent of appellant, called upon appellee with blanks as mentioned in the contract for the purpose of a settlement for the business done by appellee for the season of 1885. At this interview appellee made the statement of his dealings with the appellant, which is set out in the evidence upon blanks so furnished him, in which account as stated by him he had received from the appellants but three mowing machines, one of which, as set out in his account, was shipped him from Peoria April 8th, one from Plano June 24th and another from Plano on the 10th of July, 1885. Appellee in accounting for the disposal of these machines stated that he had sold one to Thos. O'Brien, one to Charles Baker and he had one on hand unsold. Under these circumstances it is claimed by the appellant a settlement was made on the basis of this account as stated by appellee, the agent relying upon the truth thereof. After the same was effected the account as stated and settled was by the agent forwarded to the home office, when upon examination it was ascertained that the appellee had ordered and received one other machine not accounted for in the account stated, which machine was claimed to have been ordered by appellee by a telegram to one of appellant's agents, D. M. Stampf, at Avon, Illinois, which machine so ordered was shipped on or about July 2, 1885. Appellee was on the stand as a witness on the trial below, and there admitted that he ordered the mowing machine by telegram of D. M. Stampf, of Avon, as alleged against him, but he contended then and insisted in this court, that he did not, in fact, receive from appellant but three mowing machines that season. This of course could not be the fact conceding the correctness of the account stated. The appellee admitted, as we have seen, the order, receipt and sale of the other machines from Stampf, shipped him from Avon about July 2, 1885. Therefore, if the account stated was correct, and the appellee had in fact as he admitted received another machine of the appellants, through Stampf, their agent at Avon, appellee must be indebted to the appellant, and it would have been entitled to a judgment in the court below. It remained therefore for the appellee to explain the account stated, as in that must have been contained the error, if error there was, to

escape a judgment against him. Under these conditions of the evidence in the case, the appellant asked the court below to instruct the jury as follows:

“The court instructs you that the settlement sheet offered in evidence by the plaintiff, is, under the circumstances that obtain in this case, presumed to be correct and to contain no recital of facts that is not true, and the defendant, in order to disprove any statement contained in said settlement sheet, must do so by a preponderance of the evidence.” Which instruction the court refused to give, but instead gave the following instruction asked for on the part of appellee, viz.: “3d. If the jury believe from the evidence that about the twenty-fourth day of October, 1885, the parties to this suit met and checked over their accounts together and settled the matters between them appertaining to such account, and struck a balance at that time, and then and there agreed upon that balance as the amount due from one party to the other, then and in that event, in the absence of mistake or fraud, neither party will be allowed to go behind that settlement for the purpose of increasing or diminishing the balance so agreed upon between them at that time. The burden of the proof is upon the plaintiff in this case to show affirmatively such fraud or mistake if it seeks to go behind such settlement.”

This, we think, was erroneous and would strongly tend to mislead the jury, and we find no other instruction in this record modifying the one given upon the burden of proof. We think that the instruction asked by the appellant (number one) was correct and should have been given as asked under the evidence in the case, and that the court below erred in its refusal.

The evidence, as disclosed in the record before us, was quite favorable, as it seems to us, to the appellant, and the jury should at least have been accurately instructed as to the burden of proof in the conflicting condition of the evidence.

For these errors (the refusal to give proper and the giving of improper instructions as before indicated) the judgment is reversed and the cause is remanded.

Reversed and remanded.

STEPHEN MARTIN ET AL.

V.

ELIAS B. RHEA.

Partnership—Retirement of Partner—New Partnership—Assumption of Liabilities by New Firm—Payments by Retiring Partner—Release by Him of New Firm.

Upon suit brought by a former member of a defunct copartnership against a firm succeeding it in business and assuming its liabilities, to recover for payments made by him of certain liabilities of the old firm after the formation of the new one, this court holds that by a writing executed subsequently to the payments in question, plaintiff released the defendants from liability upon certain items named, and that no recovery can be had therefor.

[Opinion filed December 16, 1889.]

APPEAL from the Circuit Court of Peoria County; the Hon. S. S. PAGE, Judge, presiding.

Mr. ISAAC C. EDWARDS, for appellants.

Messrs. WILLIAM S. KELLOGG and JAMES A. CAMERON, for appellee.

UPTON, P. J. This was an action in assumpsit, commenced to the February term, 1888, of the Peoria Circuit Court, by the appellee against Stephen Martin, Chas. O. Smalley, John C. Duncan and Chas. O. Peters, as partners, etc. Martin and Peters only were served with process. The declaration contained the common counts consolidated. The defendants served with process pleaded the general issue, a plea denying joint liability verified by affidavit, and the statute of frauds.

The record shows that some time in the year 1882 the firm of "Rhea, Smalley & Co." was formed for the purpose of dealing in agricultural implements. That firm continued in business until the fall of 1883, when it was succeeded by the firm of "Rhea, Smalley & Bowman." E. B. Rhea, C. O. Smalley, W. R. Riley and Bateman Bowman comprised its

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members. This last named firm continued in business until Feb. 2, 1885, when it was succeeded by the firm of "Rhea, Smalley & Co., No. 2," Bowman and Riley retiring and the defendant Charles O. Peters, becoming a member of the new firm. Some time subsequent, Stephen Martin became a member of the same firm. On the 10th day of March, 1885, this last named firm was succeeded by the firm of "Martin, Smalley & Co." composed of the same persons as the preceding firm with the exception, that appellee Rhea sold his interest in said business and firm to Thomas Martin, who then became a member thereof. When appellee retired from the firm and sold his interest therein, the firm of "Rhea, Smalley & Co." was dissolved and the new firm of "Martin, Smalley & Co." was formed. This new firm took the entire assets of the old firm of "Rhea, Smalley & Co." and *assumed its liabilities as shown by the books of the old firm*, and no other or further liabilities.

The appellee claims that after his retirement from said firm of "Rhea, Smalley & Co." he paid out for that firm on its liabilities, which the firm of "Martin, Smalley & Co." assumed and agreed to pay as above stated, various sums of money, aggregating \$724.21, upon which he credits two items aggregating \$408.33, leaving a claimed balance due him of \$315.88. To recover that amount this suit was brought. A bill of particulars was filed by the appellee before the trial court which is as follows:

STEPHEN MARTIN ET AL.

To ELIAS B. RHEA, Dr.

To judgment and costs for rent.....	\$195 12
To another month's rent.....	183 33
To note and interest of Kinsey & Mahler..	189 78
To money paid to Cratty Bros., Chicago, for suit of replevin of a car load of wagons..	100 00
To attorney's fees paid J. S. Lee in suit with H. O. Collins.....	15 00
To expenses to Chicago to attend suit.....	13 10
To interest on money paid out.....	27 88

Total.....\$724 21

Credits as follows, to wit:

Received of M. O. Collins for heating apparatus in Collins' building.....	\$225 00
Collected of Martin & Co. one month's rent.	183 33
Balance due said Rhea.....	315 88

Total.....\$724 21

During the trial below, the above bill of particulars was amended by appellee by striking out the item of \$189.78 charged for principal and interest on the "Kinsley & Mahler" note, and by further striking out the item of \$225, of the credit received by appellee from Mrs. Collins in settlement for the heating apparatus in the office of the building leased to the firm of "Rhea, Smalley & Bowman," thereby increasing appellee's claim to \$351.

The cause was tried by a jury in the court below and a verdict returned for the appellee with damages assessed at \$351.10, from which at a subsequent term of court was remitted by appellee the sum of \$63.40. The Circuit Court rendered a judgment for the appellee for \$287.70 with costs, from which judgment an appeal was taken to this court.

The record discloses that the building occupied by the firm of "Martin, Smalley & Co." at the commencement of this suit was held under a lease originally executed by Mrs. Collins to the before mentioned firm of "Rhea, Smalley & Bowman." At, or near the time of the execution of this lease, the agent of Mrs. Collins made a verbal contract with the lessees, that a steam heater should be placed in the office of the building so leased by "Kinsley & Mahler," at the cost of \$350. For this heater the lessees were to execute their promissory notes to "Kinsley & Mahler" for \$175 each, falling due respectively January 1, 1886, and January 1, 1887, and as the said notes fell due, Mrs. Collins was to allow "Rhea, Smalley & Bowman" a credit of \$150 on each of the notes, to be applied on the lease as payment of rent. This lease was part of the assets of the firm of "Rhea, Smalley & Co.," and passed to appellants in their purchase of such assets as before stated.

When the first of these notes matured, "Martin, Smalley &

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Co." paid it to the payee thereof, and delivered the note with money sufficient to pay the rent for that month, \$183.33, to the agent of Mrs. Collins for the rent due for that month, according to the terms of the lease. Shortly after this attempted payment, Mrs. Collins through her agent objected to receiving the note in part payment of the rent, and refused to apply \$150 upon the lease, or any other sum, and repudiated the parol contract for the "heater" and payment therefor. She notified "Martin, Smalley & Co." that she should not recognize them as her tenants under the lease, and soon thereafter commenced a suit against "Rhea, Smalley & Bowman" to recover rent under the terms of the lease to them.

In this suit she recovered a judgment, including costs, for \$195.12, being for the month's rent supposed previously to have been paid by "Martin, Smalley & Co." with the Kinsley & Mahler notes. By the terms of the lease, the lessees were prohibited from subletting the leased premises or assigning the lease without the written consent of the lessor.

Some time in the early summer of 1886, "Martin, Smalley & Co.," gave Rhea \$183.33 for another month's rent, and he paid it to the agent of the lessor, the lessor still refusing to recognize "Martin, Smalley & Co.," as her tenants, or to accept the Kinsley & Mahler note, as payment upon the rent.

Under these circumstances the appellee obtained the Kinsley & Mahler notes, and of his own motion effected a settlement with Mrs. Collins, by which she permitted an assignment of the lease to "Martin, Smalley & Co.," accepted that firm as her tenants, paid Rhea \$225 in discharge of all her liability to "Rhea, Smalley & Co.," or "Kinsley & Mahler" on the steam heater contract, which, by the original agreement, was \$300, as before shown, and having then settled and adjusted all matters in dispute as to the lease, and the tenancy of the then occupants of the leasehold, as well as the Kinsley & Mahler contract and notes, appellee made an assignment of the lease to appellants, and executed and delivered to them the following contract, viz.:

"PEORIA, August 24, 1886.

"In consideration of Stephen Martin, J. B. Duncan and C. O. Peters accepting the transfer of lease on what is known as the Collins-Ballance building, Nos. 916 and 918 South Washington street, they were to pay nothing on said lease or the steam fixtures therewith attached, only the actual rent, which is one hundred and eighty-three and thirty-three one hundredths dollars per month during the remaining term of said lease."

(Signed) "ELIAS BARBER RHEA,

"For the firm of Rhea, Smalley & Bowman."

We think this release cuts out from appellee's claim, as stated by him, \$195.12 for the judgments and costs for the rent of the building in the above release, paid in May, 1886; and the second item in said claim of \$183.33, paid for the rent of the store on the lease from Mrs. Collins prior to the release to appellants of August 24, 1886, above stated.

The third item of \$189.78 was withdrawn by appellee in the court below as improperly charged, thus leaving two small items of the account claimed, aggregating \$28.10, and the \$100 claimed paid to Cratty Bros., the appellant's liability for which, on the evidence in this record it is not necessary for us to determine. The other points made in the case we refrain from discussing, as the view we have expressed must result in the reversal of the judgment of the court below. The judgment is reversed and cause remanded for such further action therein as the parties may be advised.

Reversed and remanded.

DAVID R. SHELTON

v.

WILLIAM O'RILEY.

Practice—Verdict—Effect of in Law—Weight of Evidence.

The verdict of a jury upon a question of fact alone which has been fairly

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submitted, must stand, although it may appear to be against the weight of evidence, unless it is apparent on the face of the record that the jury were actuated by passion or prejudice.

[Opinion filed December 16, 1889.]

APPEAL from the Circuit Court of Warren County; the Hon. P. H. SANFORD, Judge, presiding.

Messrs. F. S. MURPHY and JAMES W. DAVIDSON, for appellant.

Mr. M. M. LUCY, for appellee.

URTON, P. J. The question in this case is purely one of fact, uninfluenced by any ruling of the trial court complained of by either party, and if the evidence is sufficient to support the verdict, it is conceded the judgment below must be affirmed.

The facts presented by this record are briefly these: On the 6th of December, 1887, appellee purchased of appellant a stalk field of about sixty-five acres for cattle pasturage, and for which he paid the sum of \$40. This field adjoined on the north, the right of way of the Chicago, California and Santa Fe Ry. Co., which right of way was then unfenced, but when fenced would inclose this stalk field for a distance of about 180 rods. Both parties to this contract doubtless contemplated that the railway company would build the fence along the right of way, as it was legally bound to do, and assurances were given the parties that it would be built in November or December of 1887. Appellee contended in the court below, and now insists, that appellant at the time of such purchase obligated himself to build the fence along the said right of way within a few weeks from the time of such purchase, to enable him to pasture his cattle therein, without which the stalk field would be of no value. Appellee, when upon the stand as a witness, testified to the facts before stated, supported in whole or in part by three other witnesses, as to the fencing of the field by appellant as stated above.

Appellant's testimony in the court below flatly contradicts that contention and is supported in whole or in part by three other witnesses. The jury, as was their right, accepted the version of appellee.

It may not be improper for us to remark that under the evidence disclosed in this record we should have been better satisfied if the verdict had been given and the judgment rendered the other way. Yet it is a rule of law, that by a verdict of a jury upon a question of fact alone, when fairly submitted, the successful party obtains certain rights which are recognized by the law, and that such verdict must stand, although it may appear to be against the weight of the evidence, unless it is apparent upon the face of the record that the jury were actuated by passion or prejudice. That rule is particularly applicable in the case at bar, since two juries have found upon the facts the same way. Under the application of that rule, which is too well established to be disregarded, we feel constrained to affirm the judgment below, and it is affirmed accordingly.

Judgment affirmed.

MARY J. THOMPSON ET AL.

v.

CHARLES H. WEEKS.

Injunctions—Right to Excavate Sand and Loam—Contracts—Construction—Remedy at Law—Equity Jurisdiction.

Upon a bill asking that defendants be enjoined from interfering with certain excavations, it is *held*: That under the contract between the parties the plaintiff had no right to excavate at the controverted point without permission of defendants; that his remedy, if any, for the defendant's refusal to allow him to excavate at the desired point was at law, and that equity had no jurisdiction in the premises.

[Opinion filed December 16, 1889.]

Thompson v. Weeks.

APPEAL from the Circuit Court of Will County; the Hon. DORANCE DIBELL, Judge, presiding.

This was a bill for an injunction filed in the Circuit Court by appellee against appellants seeking to restrain them from in any manner interfering or hindering the operations of appellee, or any of his employees, in excavating and removing sand and loam from the farm of the appellants in the town of New Lenox and from bringing suits against appellee or any of his employees, civil or criminal, on account of any supposed violation of the law in making such excavations. The writ was temporarily granted, but afterward, upon answer, and trial upon the evidence, the court made the injunction perpetual, giving by the decree the possession of the loam bank marked in the plat "C," in the oat field, to appellee.

The injunction was based upon a written agreement between the parties to the injunction suit and the alleged violation on the part of appellants of the said agreement. The contract between the parties by which appellee secured the right to remove loam and molding sand from appellant's farm is as follows:

"This agreement made October 6, 1889, witnesseth that Mary J. Thompson and J. M. Thompson, her husband, of the first part, hereby lease the exclusive privilege and right of using and removing for the purpose of trade loam and molding sand from their farm in New Lenox, Will county, Illinois, for a term of three years, from the first day of December, A. D. 1886, to Charles H. Weeks, upon the following conditions, to wit:

"First. That the excavations shall be confined as near as can be (for the convenience of said Weeks and for the well being of the farm and as may be agreed upon from time to time) to the immediate neighborhood of the farm crossing on the Michigan Central Railroad, where a switch is now being placed.

"Second. The surface soils shall be carefully spread over the new surface left after the removal of the sand and loam, and shall, at the expiration of this lease, or upon the sur-

render and cancellation of the same, leave the land in good shape with the banks leveled to a slope of 65 degrees.

"Third. That said Weeks shall pay said parties of the first part five cents per ton for all loam and molding sand removed from said farm, said payments to be made at the end of each and every month, taking railroad rates as a basis of settlement.

"Fourth. For the first year the said Weeks shall pay not less than one hundred dollars and for every year thereafter not less than one hundred and fifty dollars, although the sand and loam he may ship shall not amount to that sum.

"Fifth. That said party of the second part shall use for roadway in entering and leaving the premises above described a track on the south side of the Michigan Central Railroad, running parallel with the said track, and close to the railroad fence on the south side of the same.

"Sixth. The said party of the second part shall not obstruct or retard the passage of teams of the party of the first part from going or coming about farm work on the south side of the railroad.

"Seventh. That said party of the second part agrees to be responsible for all damage that may occur to property belonging to party of the first part, growing out of any neglect on his part to keep fences and gates properly secured, and should any such damages occur they shall be ascertained by appraisement, and paid by the said Weeks.

"Eighth. That said Weeks may at any time after one year, have the privilege of surrendering and canceling this lease or contract if he shall so desire, and should party of the second part so surrender this lease before the expiration of the three years he shall pay a land rent of six dollars per acre for land so used that can not be cultivated that season."

It appears that immediately after the execution of the agreement, the appellee commenced operations by excavating and shipping loam and sand from the farm in accordance with the agreement and continued operation until September 20, 1888, when he was prevented from further proceeding by appellants. At an expense of about \$250 appellee put in a switch

at the crossing, and began excavating for loam and sand immediately outside of the railroad right of way, and just west of the gate at the crossing. After having removed the deposits from about two acres, he applied to appellants for permission to open up another pit lying a little to the south of the one first worked. At first appellants objected to this, but finally granted a limited amount of loam and sand to be taken out there. According to a map in evidence, the first place where work was commenced on the land is marked "A," and the second place "B." Shortly before appellee filed his bill, he discovered a place on the farm where there was a bank of loam and sand which he claimed was better suited to his purposes and was more profitable to work than at the other two banks. This place was about eighty rods distant from the crossing and is marked "C" on the map. The appellee claimed that there was less stripping at this point, and the quality of the loam was more suitable for some of his particular purposes than that obtained in pits "A" and "B."

The appellee then applied to appellants for permission to obtain what loam he might need from this newly discovered bank, "C." The appellants, however, refused to give their consent, claiming that he had no right there under the contract, and they did not desire the excavations to proceed at that place.

The lot in which the bank "C" was located was inclosed by a fence with openings as shown upon the map. It had been used that season for an oat field, and Weeks, the appellee, had never had possession of any portion of such field and had been given no authority to enter such field. But without any further permission than the contract gave, and against the will of appellants, he took possession of said bank and commenced plowing and scraping there. Appellants ordered the workmen to cease digging there, and to keep out of such field. The workmen refused to obey appellants' orders, claiming the right under appellee, who, they claimed, would protect them in so doing. Thereupon the appellant, John M. Thompson, caused the arrest of one of the workmen by the name of Faulson, upon the charge of trespass, under the

statute. He also caused the gates or opening into the field to be closed. Thereupon and before the trial of the said Faulson appellee filed the bill in this case September 22, 1888, and obtained the injunction, as above stated, and aside from the evidence of appellee and appellant, there was not much evidence in the case to support the bill.

The appellee contends that it would be a great and irreparable damage to be deprived of the privilege of taking out loam at the pit "C," where he claims the right to take out the loam and sand under his contract.

Messrs. C. W. BROWN and FRED BENNETT, for appellants.

Mr. EGBERT PHELPS, for appellee.

LACEY, J. We think the court below erred in holding that the complainant had a cause of action and that equity had jurisdiction to grant any relief whatever. As we interpret the contract the appellants reserved the special right to permit or prohibit any further excavation on the premises except at "the immediate neighborhood of the farm crossing and the Michigan Central Railroad," where a switch was then being placed. This being so, the appellee had no right to remove and commence to excavate at point "C" on the same farm eighty rods distant from the place first designated at point "A" without the consent of appellants. It is contended by appellee that the words in the parenthetical clause of the contract, to wit, "for the convenience of said Weeks and for the well-being of the farm and as may be agreed upon from time to time," does not give appellants the right to arbitrarily and without reason refuse to allow other parts of the farm to be dug over and the sand and loam removed therefrom other than at point "A," that if the well-being of the farm, as a matter of fact, is considered and observed in the change in the place of excavation the consent of the appellants may be dispensed with entirely. We do not so interpret the contract. The right to refuse the change is expressly reserved by appellants in the contract.

The words in the first part of the contract, which grants to appellee the "exclusive right of using and removing for the purpose of trade, loam and sand from their farm in New Lenox, Will county, Ill., for a term of three years," do not, when read with the coupled conditions, grant to the appellee the privilege to remove such material from the entire farm, irrespective of the subsequent right of appellant to agree or not to agree to any change. The first clause of the contract is specific in limiting the right to change the location of removing material to the agreement of the parties. Courts can not make new contracts for the parties, but must leave it as made by them. But, even if the contract should be so interpreted as that the appellants had no right arbitrarily to refuse assent to a change of the place of excavation, for the purpose of removing sand and loam, so long as the well-being of the farm was observed and considered in so making the change, yet, we are of opinion that a court of equity would have no jurisdiction under the facts as developed by the bill and evidence to grant the relief sought. If the appellee had been refused the privilege to make a change of place in his operations in removing loam and sand in violation of the contract, and to his injury, he had an adequate remedy at law, nor do we see anything in the evidence to show that complete damages could not be recovered in a suit at law in case of a breach of the contract by appellants. But it is insisted here that this suit in equity is in the nature of a bill to enforce a specific performance of a contract and therefore that the court had equity jurisdiction. Let us examine this claim for a moment.

Suppose the appellants had refused the appellee the privilege of removing his operations from the first location to the second one, and forbade him from taking possession of any other part of the farm, and the appellee, instead of taking the law into his own hands, as he did in this case, and taking possession of the desired spot, had filed his bill in equity, asking strictly a specific performance, designating the place where he would compel the assent of appellants to his work, alleging the well-being of the farm was observed in the new selection; would it be contended that a court of equity could entertain

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judgment in such a case? We think clearly not. The contract in this view, is so vague and uncertain that no court of equity would undertake to enforce a specific performance of it and then again a court of equity, at each subsequent refusal by a party, might be called upon again and again to enforce it, therefore it is as vague and uncertain as it is. Where the contract sought to be specifically performed is uncertain in its terms a court of equity will not undertake to decree its performance but will leave the parties to their remedy at law. *Evans v. Cunningham*, 48 Ill. 78; *Fitzpatrick v. Barry*, 16 Ill. 474; *Gosse v. Jones*, 73 Ill. 508.

In order to uphold appellee's claim to remove dirt at excavation "C" the court must order a performance of a portion of a contract agreed upon and which, if it has any existence at all, is uncertain and difficult, if not impossible, to enforce. 2 Story's Eq. Jur. Sec. 793, note A; 2 Wheaton, 54, 55.

If this bill is in its nature one to enforce specific performance, then, as we have seen a court of equity would not take jurisdiction. But it is insisted that it is not a bill for specific performance, but one simply to restrain appellants from interfering in a case where the appellee was only in the enjoyment of his right under the contract and to prevent irreparable injury. We cannot think that this case comes within the rule excepted for, when its subject and nature is considered. The appellants refused appellee the privilege under the contract to take possession of or excavate at point "C" on the farm. It then became a question of fact to be determined by the court even under the contention of appellee, whether said point is one that may be worked under the contract, depending upon whether it can be excavated consistently with the well-being of the farm. Appellants deny it and refuse to agree, and appellee has taken possession of it, or proposes to do so, contrary to appellants' will, thus determining the question in dispute for himself, at least temporarily, and tying up the hands of appellants, by this injunction suit, from interfering with him in his work, or by bringing suits, until a final hearing. By the time the cause would be heard the work

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would be done at the disputed point, and perhaps irreparable damage caused to the farm, and the court may finally decide that possession was wrongfully taken. By the time this cause is heard another and another point may be selected, and the same process repeated till finally the farm is ruined, and this by the unwarranted interference of a court of equity.

What is sought to be done by this injunction and bill is, in our opinion, farther from being within the jurisdiction of a court of equity than a bill purely for specific performance. It encourages acts of trespass and the taking the law into his own hands by appellee, by tying appellant's hands by injunction, while the former takes execution of the contract as he interprets it at his own will before hearing. Thus, by the unwarranted interference of a court of equity, the appellants' farm may be irreparably injured, which ought to be a sufficient test to show that a court of equity ought not to take jurisdiction, as one of the principal grounds of equity jurisdiction is to grant injunctions to *prevent* irreparable injury, while taking jurisdiction in a case like this would be to aid it. Hence it will be seen that appellee by taking unwarranted possession of the point "C" and excavating there, did not give a court of equity jurisdiction where it would not originally have had it, to enforce specific performance. The policy of the law is always to discourage parties from taking the law into their own hands, even though it turns out in the end that such party had the right in the case.

For these reasons we hold that the court below erred in retaining jurisdiction and in granting the relief sought.

The decree is reversed and the cause remanded with directions to dismiss the bill.

Reversed and remanded with directions.

39 634
87 808

GEORGE W. BROWN

v.

THE GALESBURG PRESSED BRICK AND TILE COMPANY.

Practice—Stipulation to Submit Cause to Particular Judge—Right of Appeal—Finding of Court—Weight of—Practice—Admission of Evidence.

1. An appeal will lie to this court from a judgment entered in an action of case for alleged negligence, where it is stipulated that a jury be waived, that proof of negligence be waived, that the case be submitted to a particular judge, and that when he shall have determined the compensatory damages, judgment shall be entered for one-half the amount so found.

2. The same consideration is due to the finding of the court, in a trial without a jury, upon a question of fact, as to the verdict of a jury, and that finding will not be set aside unless manifestly against the weight of the evidence.

3. This court, on appeal from a judgment entered on trial by the court, will not consider the question of the admission of improper evidence, but no propositions of law having been submitted to the court, will presume that the court below determined the issues upon competent evidence.

[Opinion filed December 16, 1889.]

APPEAL from the Circuit Court of Knox County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. M. J. DOUGHERTY, for appellant.

Mr. J. A. MCKENZIE, for appellee.

LACEY, J. This was a suit brought by appellee against appellant in an action on the case to recover damages accruing to the former by means of the breaking of the appellant's dam and the carrying off wood and coal by water and filling coal shaft, destroying brick, kiln and machinery, etc., which it alleged was occasioned by the carelessness of appellant in not using the proper skill in constructing the dam.

The appellant pleaded the general issue and it was stipulated to waive a jury and try the case before the court, the

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Hon. A. A. Smith, Judge, presiding; and appellant waived the proof of negligence on part of appellee, that is, it was admitted, and it was further stipulated, that when the judge sitting as said court should have determined such damages, which should be actual or compensatory only, judgment then should be rendered for the appellee and against appellant for the one-half of the amount of such damages established by the evidence and found by the court. The nature of the stipulation was kept from the knowledge of the judge until after the trial and the finding by the court. The judge found the damages to be \$2,900, and in accordance with the agreement, judgment only for \$1,450 was rendered against the appellant.

The first question arising is on the motion of the appellee to dismiss the appeal for the reason that the trial was in the nature of an arbitration and the agreement amounted to a confession of judgment from which it is insisted no appeal could be taken. We think the point is not well taken. It was essentially a trial by the court and the fact that it was agreed that a particular judge was to try the case would not change the nature of the proceeding.

The right of trial and appeal remained to appellant the same as though it had been submitted to a jury. There was no express waiver of such right of appeal by the terms of the agreement and without such waiver the parties to the agreement would have all the rights remaining allowed by law. Nor was the agreement to accept a judgment for one-half the amount found by the court a confession of judgment for that amount. The amount of the judgment was fixed by the finding of the judge and depended upon a proper trial of the issue by the court to the extent of one-half, and there was no waiver of any right to appeal by express terms of the agreement, nor do we think such could be the case by any fair inference. Therefore, the motion to dismiss the appeal must be overruled.

The main point urged by appellant for reversal is that the finding of the court was grossly against the weight of the evidence. The items of loss are the loss of twelve cords of wood, damages to fire brick kilns and to brick already burned and to

a large amount of coal washed away by the flood caused by the breaking of the dam, and damages to four brick kilns and to time and labor caused by the overflow, aggregating as claimed by appellee the sum of \$4,427.24½. But the court found from the evidence the sum of damages to be only \$2,900. The evidence is very voluminous and contradictory and we have examined it carefully with a view of arriving at a just conclusion. Space and time forbids us giving in detail the results of our examination and a full canvass of the evidence. We will say generally that there appears to be sufficient evidence upon which the court below could base the finding and judgment. It did not take the highest amount as an estimate of the damages shown by appellee's witnesses nor the lowest amount testified to by appellant's witnesses, but seemed to weigh the matter impartially so far as we are able to judge. The same consideration must be given in favor of the finding of the court where the court tries the case as where it is tried by a jury. And unless the finding is manifestly against the weight of the evidence the finding will not be disturbed and we are unable to say that such is the case here.

The point made that the court erred in admitting certain testimony against appellant's objection, we think can not be availed of in this court, even if it was error, which we will not stop to inquire. There were no propositions of law submitted to the court by appellant and without such we must suppose the court did not err in giving weight to improper evidence. Although the evidence may have been improperly admitted, we will presume the court only decided the case on the legal testimony.

Seeing no error admitted by the court against the appellant, the judgment of the court below is affirmed.

Judgment affirmed.

MARY T. OWENS ET AL.
V.
GUY STAPP, RECEIVER, ETC.

22	653
45	493
82	653
59	138

Banks—Fraudulent Acts of Cashier of National Bank—Acts Ultra Vires—Acceptance by Bank of Benefits—Can Not Escape Liabilities—Interest on Overdrafts.

1. A bank should not be allowed interest on overdrafts of a depositor.
2. The evidence in the case at bar shows that the acts of the cashier were intended by the parties to be in his official and not in his individual capacity.
3. Acts of a cashier of a bank, in behalf of the bank, not criminal and contrary to public policy, though not strictly within the powers of the bank, done in the course of a transaction which has been executed in whole or in part, can not be so repudiated by the bank that it should enjoy the benefits and escape the liabilities of the transaction.

[Opinion filed December 16, 1889.]

IN ERROR to the Circuit Court of Warren County; the Hon. ARTHUR A. SMITH, Judge, presiding.

Messrs. PORTER & MACDILL, for plaintiffs in error.

Messrs. KIRKPATRICK & ALEXANDER and R. J. GRIER, for defendant in error.

UPTON, P. J. This was a bill in equity brought by plaintiffs in error to the Circuit Court of Warren County, against defendants in error, in which is prayed special and general relief, upon the following facts, which are in substance set forth in the bill.

The First National Bank of Monmouth, Illinois, was duly organized under the act of Congress known as the "National Banking Act." B. T. O. Hubbard was its cashier duly appointed. James F. Owens, husband of Mary T. Owens, was indebted to various persons, and on the 21st of May, 1880,

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and the bank to learn of a source from whence he could obtain a sum of \$2,400, with which to liquidate that indebtedness. The bank's cashier, acting for the bank, offered to make a loan to the defendant from the bank, and the offer was accepted for which Owens executed three notes payable to the bank, one for \$1,000 and two for \$700 each, all due and payable three years from date, with interest at eight per cent. To secure these notes Owens and his wife, Mary I., gave in a mortgage upon the real estate of the wife. The interest as it became due upon this loan was paid by Owens to Hubbard in each year at the bank.

On the 1st of March, 1883, Jas. F. Owens made a further loan of the bank through the cashier of the sum of \$250, due in ninety days and payable to Mary I. It was in a note payable to the bank, bearing date some time about February 1, 1883, this indebtedness being made because Owens was in need of more money, being pressed for payments and was informed by Hubbard that he was held the three notes given for the \$2,400 loan to Mary I., and that he would be willing and was desirous to make a loan upon the same security as then held for the debt of Mary I. It was agreed that the bank should advance to Jas. F. Owens the money to be applied to the payment of the notes secured by the mortgage of Mary I., less the threemonths interest thereon, and in satisfaction of the \$250 notes cancel all these notes and execute a release of record the mortgage of Mary I., and cause to be placed of record the new mortgage to secure said last loan, and place the balance of the \$250, remaining after making such payments, to the credit of Jas. F. Owens in the books of the bank.

In compliance of this last mentioned agreement, plaintiffs in error executed four notes, bearing date February 1, 1884, payable three years from date to Hubbard (cashier), together with a mortgage to secure the same, (which notes bore interest at eight per cent per annum, both Owens and his wife being jointly and severally bound for the execution thereof,) on the land of the wife, being the same security which had been agreed upon, and delivered the same so executed, to its cashier at the bank.

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When these notes and mortgage were delivered, Hubbard informed plaintiffs in error, that he could not complete the matter at that time, by the delivery and cancellation of the notes of date of May 21, 1880, for the reason, as he then stated, that one of the notes was not then in the bank, but would be in a few days, and then the whole matter should be closed up and completed as had been agreed. To obviate all trouble to plaintiffs in error by this delay, it was agreed that Jas. F. Owens might draw checks on the bank the same as if such balance had been ascertained and placed to the credit of plaintiffs in error, and when the note was returned, he, Hubbard, would ascertain the exact balance and complete the agreement by giving the credit on the books of the bank, cancel and deliver the old notes of May 21, 1880, release the mortgage given to secure the same, and deliver said canceled and released notes and mortgage, together with the \$250 note to Jas. F. Owens, as he had previously agreed to do. These notes were never delivered, nor the old mortgage released, nor the credit given on the books of the bank, and but one of the notes taken up and canceled, as hereafter stated.

Not one of the notes of May 21, 1880, were, at the time of making the before mentioned agreements, in possession of the bank. Its cashier, Hubbard, had taken those notes before that time, and sold and transferred the same to certain customers of the bank—the note of \$1,000 to one William P. Pressley, one for \$700 to a Miss French, and the other one for \$700 to one Cyrus Atwood, all of which was unknown to the directors of the bank, or the plaintiffs in error.

In the performance of the agreement, however, Hubbard, on or about February 6, 1884, negotiated two of the new notes of date February 1st, one for \$1,000 and the one for \$500, to the same William P. Pressley, who then held the \$1,000 of May 21, 1880, taking up and canceling the \$1,000 note of May 21, 1880, and on the 8th of February, 1884, Hubbard assigned one other of the \$1,000 new notes, dated February 1, 1884, to one David Haley, in consideration of \$1,000, which the bank owed Haley on certificates of deposit issued by the bank. Pressley paid Hubbard, for the bank, for the two notes pur-

chased as above stated, by his check on the bank for the difference between the note then held by him of \$1,000, of date May 21, 1880, and interest thereon for about nine months, and the \$1,500, being the face of the two notes purchased by Pressley, the amount of such check being \$443.78, and the cashier, Hubbard, allowed James F. Owens to draw on the bank from February 6, 1884, under said agreement, to March 5, 1884, about \$563.14.

In that condition matters remained, with one note of \$1,000, of date May 21, 1880, taken up and canceled, and one of the \$1,000 notes of date February 1, 1884, and the mortgage, in possession of the bank (the note not indorsed), the old mortgage of May 21, 1880, then and still uncanceled, and the new one unrecorded, until April 5, 1884, when the directors of the bank, learning of the fraudulent acts and defalcation of its cashier, Hubbard, took control of its affairs from the hands of its cashier, Hubbard, who before that time had been in almost exclusive control thereof—placed the same in the custody of John Carr, one of its directors, and on the 8th of April, 1884, the bank closed its doors, went into liquidation, and defendant in error—Gny Stapp—was appointed its receiver, under and pursuant to the provisions of the above mentioned banking act. In the meantime, Carr, acting for the bank and before it ceased its business as a bank, placed the mortgage of date February 1, 1884, on record, while the notes for \$700 each, in the hands of Atwood and French, were outstanding, and while the note for \$280 was in the possession of the bank uncanceled, and no credit given upon the books of the bank to Owens, as had been agreed, and the books of the bank showed overdrafts against Owens of \$512.04. The plaintiffs in error admit in their bill of complaint, that Pressley, Atwood, French and Haley hold as innocent purchasers for value, notes secured on the lands of Mary P. Owens, amounting in the aggregate to the sum of \$3,900 as principal; ask relief against the bank for the wrongful acts of its cashier and director, Carr; pray that the note for \$280 and the overdrafts for \$512.04 be canceled, and seek a decree against the bank for the excess over \$3,500 (evidenced by the

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note held by Pressley, Atwood, French and Haley as before stated, against the lands of Mary T. Owens), and that the \$1,000 note, of date February 1, 1884, not negotiated, be surrendered, and for general relief.

Defendant in error, Guy Stapp, as receiver, answers, denying the allegations of the bill, and filed his cross-bill, claiming that the bank held the \$1,000 note of February 1, 1884, with the mortgage of same date, as collateral security for the note of \$280, date October 30th, and the overdrafts of J. F. Owens amounting to \$512.04; made Pressley, Atwood, French and Haley defendants, and prayed for foreclosure of the mortgage of February 1, 1884. Answers to cross bill and replications were duly filed, the proofs taken and heard, and the court below denied the relief sought in the original bill, except to decree that the defendant in error, Guy Stapp, should cancel and surrender the \$1,000 note of date February 1, 1884.

On the cross-bill the court held, that the note of \$280 of October 30th, was still due and unpaid, and also the overdrafts were due and not paid, and rendered a decree in favor of Guy Stapp, as such receiver, against Mary T. Owens and James F. Owens jointly, for the amount of the \$280 note and interest, aggregating \$377.37.

And the court below also rendered a decree against James F. Owens individually for the amount of such overdrafts and interests thereon in the sum of \$640.04 and refused other relief. To this decree both parties excepted and have assigned errors of record.

In this decree we think the court below erred. Interest under our statute can only be allowed by agreement of the parties, on written instruments, or on an account stated and agreed upon between the parties, in the class of cases now before us, and not otherwise; and the court was in error in allowing interest on the amount claimed for the overdrafts as appeared upon the books of the bank.

That court also erred in our judgment in holding that the several transactions hereinbefore stated with B. T. O. Hubbard as the cashier of the bank were the individual transactions of Hubbard, for which the bank was not liable, and also

erred in holding that such transactions between Hubbard, in behalf of the bank, even if done in its behalf with the plaintiffs in error, were *ultra vires* to the extent claimed.

We think the evidence sufficiently shows that the entire transactions between James F. Owens and Hubbard were all done and transacted in behalf and for the benefit of the bank and were so understood and intended at the time, both on the part of the cashier, Hubbard, and Owens, and was in no way the personal business of Hubbard or one in which he was in any manner personally lawfully interested. The note for \$1,000, of date February 1, 1884, then unsold, was found among the other papers and assets of the bank. To this note was attached a memorandum which manifested beyond cavil that it was an affair of the bank, and not that of Hubbard personally. This memorandum, which is in the handwriting of Hubbard, shows the accounts in the bank of this transaction; the overdraft of \$512.04 from the \$1,000, received from the sale of the note to Haley, left the sum of \$487.96 as therein stated, if that had been charged to the bank as it should have been on the bank books. It is not pretended that Hubbard kept any private books of account in other transactions of like character, while acting as such cashier, of which there were others. It was done for the benefit of the bank and not for himself, and this memorandum, with the other circumstances in the case, are conclusive in our judgment that such was the intention. It is further manifested by the way the business was transacted in the fact of allowing an overdraft to the amount of \$512, with no credit on the books or security to the bank therefor.

It is urged here, as a complete answer to all the facts and circumstances (to some of which we have above alluded) that such transactions were not within the powers of the bank, under its charter. This, if conceded to be strictly true in a technical sense, does not bar the relief sought; for the transactions in the case at bar, as shown by the record, were not criminal nor against public policy, and when *once executed in whole or in part as in this case*, the bank can not repudiate the transaction, hold and enjoy the benefits, and escape the liabilities.

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The note was made to Hubbard, no doubt as cashier—though that designation does not appear—sold, and the money from Haley and Pressley received by and for the benefit of the bank. The bank must account for it—in equity and good conscience it should—and we see no legal obstacle to its being compelled so to do, at least to the extent that the agreement had been executed. Had the agreement been unperformed on the part of the bank, while it remained executory, the principle of "*ultra vires*" might apply, perhaps, but which need not be determined here. First Nat. Bk. of Monmouth v. Brooks, 22 Ill. App. 238, and cases cited therein; Ohio and Min. Ry. Co. v. McCarty, 6 Otto (U. S.), 258; Darst v. Gale, 83 Ill. 141; Bradley v. Ballard, 55 Ill. 413; Ward v. Johnson, 95 Ill. 240; 65 Ill. 458–60; N. W. Bk. v. Matthews, 8 Otto (U. S.), 621; Fortin v. Nat. Bk., 112 U. S. 439; N. Bk. v. Whitney, 103 U. S. 99.

Thus it appears, that while Hubbard managed the affairs of the bank, he proceeded in the performance of the agreement under which Owens delivered to the bank these notes and mortgage for \$3,500 as before stated, to take up and cancel the \$1,000 note in Pressley's hands of date of May 21, 1880, and substituted in lieu thereof one of the new notes, date February 1, 1884, for \$1,000, and had sold to Pressley one of the new series of notes for \$500 of the same date, and one other of this new series to Haley for \$1,000, aggregating the sum of \$2,500, leaving in the bank the other one of this new series of notes for the sum of \$1,000, undisposed of—and he had allowed James F. Owens to check out (or overdraw) from the bank \$512.04 as shown by its books.

So far the original contract with plaintiffs in error was completed, when, on the 8th day of April, 1884, the cashier was relieved of his duties at the bank, the directors took charge of its affairs and filed the new mortgage dated February 1, 1884, for record, and the same was thereafter recorded; the bank holding the remaining \$1,000 note of plaintiffs in error, refused to surrender it, and claimed to hold it by right of some agreement between the makers thereof and the bank, by which such note became, and was of right held as collateral

security for the overdraft of \$512.04 (to substantiate which claim there is no evidence in this record), and refused to carry out the original contract. After the bank went into liquidation and the defendant in error, Guy Stapp, took charge of its affairs, this claim of the bank, as before stated, was by him made and re-asserted in his cross-bill filed herein. Why then, should not the bank be charged with this contract made by its cashier, so far as it has received the benefits thereof, or has ratified it, either in whole or in part? Clearly, Hubbard, as cashier, has authority to bind the bank in making the agreement for the loan of the \$3,500 in money to plaintiffs in error, and that the bank can not now repudiate that contract and keep its fruits, seems equally clear. *Railway Co. v. McCarthy*, 6 Otto (U. S.), 258; *Twin Lick Oil Co. v. Maebury*, 1 Otto (U. S.), 587; *Fleckner v. U. S. Bank*, 8 Wheaton (U. S.), 357; *Mechs. Bk. of Alexandria v. Bk. of Columbia*, 5 Wheat. 326; *Bk. of U. S. v. Dandridge*, 12 Wheat. U. S. 64; *Casey v. Society Credit*, 2 Woods, 77, and *Thompson N. B. Cases*, 293.

Where a corporation is acting within the scope and purposes of its organization, all parol contracts made by its authorized agents are held as express promises of such corporation, and the benefits arising therefrom or conferred thereby raise implied promises and legal obligations, for the enforcement of which an action lies against such corporation. *Bank of Columbia v. Patterson*, 7 Cranch. (U.S.) 299; 5 Wheat., *supra*, 326; 8 Wheat., *supra*, 338; *Bk. of Metropolis v. Gultshlick*, 14 Pet. (U. S.) 19; *Gottpeid v. Miller*, 104 U. S. 521.

To apply the doctrine of "*ultra vires*" to the case at bar, therefore, would work a legal wrong, which, as we have seen, is not allowed, and should not be. By the negotiation and sale of the Owen notes by its cashier, Hubbard, indebtedness of the bank has been paid to the amount of nearly \$1,500, and the bank is now indebted to Mary T. Owens (whose property was pledged for the payment of the \$3,500 loan as well as the previous loan of \$2,400), and it should account to her for the amount of that indebtedness, or to the extent of whatever amount was so paid by her securities.

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In the view we take of this case under the evidence, as already indicated, the court below should have dismissed the cross-bill of Guy Stapp, receiver, etc., for want of equity, and have granted the relief to plaintiffs in error, sought by the original bill of complaint, as follows:

First. Order and decree that the note of \$1,000, dated May 21, 1880, now canceled and held by the receiver, be delivered plaintiffs in error. Second. Charge the bank with the amount of moneys received from the sale to Haley of the \$1,000 note of date February 1, 1884, which was paid by the certificate of deposit, as before stated, also the amount received from Pressley on the sale to him of the \$500 note of date February 1, 1884, being \$143.78 (or the actual amount when ascertained), for which was given his check on the bank at the time of such purchase, as above stated, and from this amount, when ascertained, deduct this overdraft of Jas. F. Owens of \$512.04, or for the actual amount of such overdraft, when ascertained, without interest, and also deduct the \$280 note of date October 30, 1883, with interest to the date of such decree, and further direct and decree that the note for \$280, aforesaid, and the note for \$1,000, of date February 1, 1884, now in the possession of such receiver, be canceled and delivered to plaintiffs in error, or one of them, and if upon such adjustment, made as above indicated, any balance shall be found due to plaintiffs in error, or to either of them, order the same paid in due course of distribution, etc., by the said receiver.

For that purpose the decree below on the original and cross-bills is reversed, and the cause is remanded to the Circuit Court for its further action in accordance with the views above expressed.

Reversed and remanded with instructions.

INDEX.

ADMINISTRATION.

1. Under Sec. 94, Chap. 3, Rev. Stat., an administrator is authorized to sell crops growing on his intestate's lands at the time of his death and apply the proceeds to the payment of decedent's debts.

Cheney v. Roodhouse,

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2. The denial of the petition of a legatee for an order on the administrator to pay a balance claimed to be due over and above the sum paid for the legatee's interest by said administrator, who subsequent to the purchase sold the property in question by order of court, cannot operate as a bar to a bill in behalf of the legatee to set aside the conveyances made, upon the ground of fraudulent procurement.

Dowdall v. Canedy,

207

3. Honest misstatements by an administrator as to the legal effect of the provisions of a will do not constitute fraud.

Id., 207

4. A judgment against an administrator appointed in one State is not evidence of an indebtedness as against an administrator of the same estate appointed in another State, nor as against the executor or heir at law of the same decedent when sued in another State from that in which the judgment was rendered.

McGarrey v. Darnall, 226

5. Upon the filing of a bill to subject certain assets of a deceased person to the payment of debts, it clearly appearing that a portion thereof could have been reached by legal remedies, and there being no allegation as to the value of such portion, it will be presumed that they were sufficient to pay the debts in question.

Ward v. Wood, 289

AGENCY—See BANKS, 3; INSURANCE, 7, 8.

1. Where an agent's authority is limited to the settlement and collection of a claim, and he has reported to, and fully settled with his principal in the matter of the agency, the subsequent indorsement by the former agent of a check, in the principal's name, though the same was given as an installment on such claim, is not only unauthorized, but, unless done with the intent of at once taking the proceeds of the check to the principal, criminal.

O'Bannon v. Vigus, 473

2. The fact of such criminal act, near the close of a long life of apparent integrity, under no special pressure of need or greed, and in the face of great risk, is to be judicially found only upon clear and satisfactory proof. Something more than a bare preponderance of evidence, leaving a grave doubt, is required.

Id., 473

AGENCY. *Continued.*

3. In an action brought by a manufacturing company to recover from one of its agents, the price of a machine received by him and not accounted for in his settlement sheet, where it appeared by defendant's own admission that he had received a machine not reported in such sheet, the burden was on him to establish his claim that he had not received a machine which *was* included in the settlement. *Plano Mfg. Co. v. Parmenter*, 633

APPEAL AND ERROR—See HIGHWAYS, 3; PRACTICE.

1. In the case presented, this court holds that certain remarks of the trial judge made in the course of the trial can not be complained of. *Brown v. Walker*, 199
2. A question to which no objection was made in the trial court can not be considered here. *J. S. Ry. Co. v. Southworth*, 307
3. In the case presented, there being no bill of exceptions or exception taken to the final judgment or rulings of the trial court, the judgment for plaintiff can not be disturbed. *Condon v. Churchman*, 317
4. Appeals depend wholly upon the statute and can be taken only where it provides for them. *Lockman v. County of Morgan*, 414
5. Where the evidence upon a question of fact is conflicting the verdict of the jury thereon will not be disturbed. *C. & A. R. R. Co. v. Elmore*, 418
6. Assignments of error not called to the attention of the court below upon the motion for a new trial, but first raised here, can not be considered. *Id.*, 418
7. Technical objections to instructions will not be considered by this court where it appears that the jury could not reasonably have been misled. *Id.*, 418
8. In the absence of a bill of exceptions and certificate of evidence, the only question is whether the findings of the court below are sufficient to sustain the decree. *Hubbard v. Stapp*, 541

ATTACHMENTS—See REPLEVIN, 6.

1. Expenses incurred by the assignee of a co-partnership, of which a defendant in attachment was a member, in defending an attachment, can not be recovered, the same having been defeated in an action by such assignee upon the bond given by the attaching creditors in the attachment proceeding. *Weir v. Dustin*, 388
2. Were this otherwise, a personal judgment against the debtor, obtained in the attachment proceeding, could be set off in such an action by the assignee. *Id.*, 388

BANKRUPTCY.

1. A judgment obtained by default in an action commenced after the defendant had been adjudged a bankrupt and discharged, is not rendered void or released by such discharge. *Jones v. Hunter*, 445

BANKS—See NEGOTIABLE INSTRUMENTS, 4.

1. A bank should not be allowed interest on overdrafts of a depositor. *Owens v. Stapp*, 653
2. The evidence in the case at bar shows that the acts of the cashier

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were intended by the parties to be in his official and not in his individual capacity. *Id.*, 653

3. Acts of a cashier of a bank, in behalf of the bank, not criminal nor contrary to public policy, though not strictly within the powers of the bank, done in the course of a transaction which has been executed in whole or in part, can not be so repudiated by the bank that it should enjoy the benefits and escape the liabilities of the transaction. *Id.*, 653

BILLS OF EXCEPTIONS—See **APPEAL AND ERROR** 3, 8; **PRACTICE**, 9.

CARRIERS—See **DELIVERY, RAILROADS.**

1. Where a shipping receipt, upon which recovery is sought to be had, does not contain any express agreement to forward certain goods to their destination, to ascertain the carrier's undertaking with reference thereto, resort must be had to the duties imposed, and promises implied by law. *I. C. R. R. Co. v. Miller*, 259

2. Reasonable time, within the meaning of a contract of affreightment, must be determined by the circumstances attending and surrounding a given transaction. *Id.*, 260

3. It seems, that if a shipper promises the carrier to do something which will enable the latter to make the time of transportation shorter than it otherwise would be, and fails to perform it, such fact can be shown by the latter in excuse for the delay, and without changing or modifying the contract of affreightment. *Id.*, 260

4. In the case presented, this court holds that there was no such delay in the transportation of the grain involved, as would render defendant liable in damages herein; that in a former action defendant was charged with the same negligence with reference to the same merchandise as is here set up, and that the same is a bar to the present suit. *Id.*, 260

CONSTABLE—See **PRINCIPAL AND SURETY**, 1.

CONTRACTS—See **NEGOTIABLE INSTRUMENTS**, 1.

1. Where a contract is reduced to writing there is no fact affecting its terms for the jury to find. The law then determines the intent of the parties, from the written expression, and so fixes its meaning, which it is the province of the court to declare. *Morgan v. Bloomington Mut. Life Benefit Ass'n*, 79

2. In an action brought to recover a balance alleged to be due on a building contract, the errors being unimportant and immaterial, and substantial justice having been done, this court declines to interfere with verdict for plaintiffs. *McDonald v. Moore*, 142

3. To be a contract in writing a written instrument must set forth the undertakings of the parties to it so plainly, as to require neither parol testimony nor the promises or duties which the law would imply from the facts stated, to ascertain the extent and force thereof. *I. C. R. R. Co. v. Miller*, 259

4. In an action upon a contract containing the names of certain individuals, the language thereof indicating that they were at the time of its execution school directors of the district in question, but not that

CONTRACTS. Continued.

they were acting in such capacity, this court holds that they were individually liable thereon, and declines to interfere with the verdict for the plaintiffs. *Sharp v. Smith*. 336

5. In an action brought to recover a sum named in a contract as the consideration of a deed of the right to an invention within a certain specified territory, this court holds, that under the same, the tender of a deed was necessary to complete the right of action for the sum in question; that the acceptance of the contract by defendants, though without signing it, made it binding on them upon tender within a reasonable time and not a mere option, and that the same was not made within such time. *Wheeler v. Fishell*, 343

CORPORATIONS—See DRAINAGE, 1; INSURANCE, 3.

1. The attempted release by the directors of a corporation, of one subscriber to the capital stock from the payment of his subscription, does not release another subscriber, not agreeing to such attempted release, from such payment. *Fey v. Peoria Watch Co.*, 618

2. A subscriber to the capital stock of a corporation, who claims to be released from his subscription by reason of fraudulent inducement used in securing the same, must claim his release at the earliest possible moment. *Id.*, 618

3. The installments of a subscription to the capital stock of a corporation draw interest from the date when they become due. *Id.*, 618

4. In an absence of statutory requirement to the contrary a director of a corporation need not necessarily be a stockholder. *Id.*, 613

5. In the case presented, this court holds that the corporation plaintiff having been organized and having received its charter, the introduction of the subscription paper was unnecessary to show organization. *Id.*, 618

COSTS—See CRIMINAL LAW, 3; MUNICIPAL CORPORATIONS, 17; SCHOOLS, 3.

1. The question of costs is largely in the discretion of the chancellor hearing the cause, and in the present case that discretion was properly exercised. *Magnusson v. Charlson*, 581

2. Where the Supreme Court reverses a decree of the Circuit Court, and the judgment of this court, affirming the same, and remands the case with instructions as to the decree to be entered, but the mandate is silent as to costs, it will be presumed that the Supreme Court intended the chancellor to exercise his discretion therein. *Murphy v. Loos*, 595

CRIMINAL LAW—See AGENCY, 1, 2; DURESS, 1.

1. Where an information charged the plaintiff in error and his brother with an assault with a deadly weapon, "to-wit, a club and knife," an instruction to the jury that the information charged the defendants with making an assault with a deadly weapon with intent, etc., and that if the jury believe, from the evidence, beyond a reasonable doubt, that the defendants, as charged, did make the assault with a deadly weapon with an intent, etc.; and where no considerable provocation appeared, or the circumstances showed abandoned and malignant

CRIMINAL LAW. *Continued.*

hearts, they should return a verdict of guilty, was not erroneous, although the evidence tended to show an assault by the plaintiff in error alone and with a club only. *McNary v. The People*, 58

2. A deadly weapon is a weapon likely to produce death or great bodily harm by the use made of it. *Id.*, 53

3. In the case presented, this court declines to interfere with the decision of the court below, refusing an apportionment of costs, it not appearing that any costs were made, not necessary for the prosecution of the case as against the plaintiff in error. *Id.*, 58

4. Under Sec. 15, Chap. 60, R. S., county boards have power to offer the reward therein named for the capture of a thief, where the property stolen is a horse of less value than \$50. *Butler v. McLean County*, 397

DAMAGES—See INSTRUCTIONS, 1; RAILROADS, 15; REAL PROPERTY, 2.

DECEIT—See PARTNERSHIP, 1.

1. An action may be maintained for false representations and deceit used to induce parties to enter into a contract whereby they have been damnified, although the parties may have entered into a written agreement and in such agreement there be a warranty or stipulation upon the point covered by the misrepresentations. The action will also lie if there is no reference in the contract to the subject of such misrepresentations. *Antle v. Sexton*, 437

2. In the case presented, evidence tending to show that, notwithstanding the property sold did not correspond with the representations, the plaintiffs received their money's worth, was properly refused. Plaintiffs were entitled to the benefit of their contract. *Id.*, 437

DELIVERY.

1. The presentation of shipping receipts, attached to which are drafts upon purchasers of grain, drawn by sellers thereof, shows that the property is in the hands of the carrier, and amounts to a delivery to the purchaser. *I. C. R. R. Co. v. Miller*, 259

DOGS—See EVIDENCE, 1, 2.

DOWER—See TRUSTS, 1.

1. A surviving husband, when dower has not been demanded by him, nor set off to him, can not hold one-third the rents and profits of his deceased wife's lands as against the minor heirs. *Bedford v. Bedford*, 455

DRAINAGE.

1. A drainage district, organized under the law in force in 1879, is a quasi corporation and not liable for the negligent acts of the commissioners, although they result in damage to private property. *Elmore v. Drainage Commissioners*, 122

DRAM SHOPS—See MUNICIPAL CORPORATIONS, 17.

DURESS.

1. The arrest and detention of a party charged with a crime, with-

DURESS. *Continued.*

out regard to his guilt or innocence, for the purpose of enforcing the settlement of a claim, without the intention of enforcing the criminal law, is an abuse of criminal process, and against public policy, and the party causing such arrest will not be permitted to enjoy the results obtained thereby. *Mayer v. Oldham*, 233

ELECTIONS—See MUNICIPAL CORPORATIONS, 1, 2.

EMBEZZLEMENT—See INSURANCE, 11.

EQUITY—See JURISDICTION; TRUSTS.

ESTOPPEL—See FEES, 2; MORTGAGES, 4.

EVIDENCE—See ADMINISTRATION, 4; AGENCY, 2; CORPORATIONS, 5; DECEIT, 2; FORCIBLE DETAINER, 1; PLEADING, 1; RAILROADS, 17; RECEIPTS, 1, 2; WITNESSES, 2.

1. Evidence tending to show that defendant's dog, at other times and to other persons than those referred to by plaintiff's witnesses, was quiet and had never offered to bite, should be refused. *Linck v. Scheffel*, 17

2. Evidence tending to show that plaintiff at other times and places had teased and worried the dog is inadmissible. *Id.*, 17

3. Petitions on file for the removal of the case to the Federal Court, in which the defendant alleges his appointment as receiver by such court, can be judicially noticed by the court and avoid the necessity of proof of defendant's appointment as receiver. *McNulta v. Lockridge*, 86

4. Where there is no living witness of an accident, causing the death of the person in question, evidence as to his habits, whether careful or otherwise, is admissible in an action against the party through whose alleged negligence the accident occurred. *Id.*, 86

5. While a party may not impeach the character of his own witness, he is not bound by his testimony and may contradict him by other witnesses, even though the evidence so offered may collaterally have the effect of showing the witness is unworthy of belief. *McFarland v. Ford*, 173

6. The refusal of the court to admit evidence on a question which, by other evidence in the case, was conclusively settled against the party excepting, does not constitute reversible error. *Leinweber v. Forest City Ins. Co.*, 190

7. In an action against a railroad company for injury to stock on its track, where the main question was whether or not the engineer could, by the exercise of reasonable care, have seen the animals in time to avoid the accident, evidence of experiments made to determine the distance from the point of the accident at which the stock could have been seen by the engineer was admissible, although the conditions of the experiments were not precisely those existing at the time of the accident. *I. C. R. Co. v. Burns*, 196

8. The admission of such testimony in rebuttal was discretionary with the court below. *Id.*, 196

EVIDENCE. *Continued.*

9. A ruling of the trial court, on a question of admitting certain testimony, can not be complained of where the complaining party received the benefit of all the evidence of the witness to which he was entitled. *Brown v. Walker*, 199

10. In an action against a railroad company to recover for injuries to stock struck by a train upon its track, the judgment of a witness, derived from an observation of the tracks of the animals and other indications, as to the place where they came thereon and as to their direction and speed, is admissible in evidence. *C. & A. R. R. Co. v. Legg*, 218

11. Testimony as to experiments made by witnesses to determine whether stock could have been seen by the servants of a railroad company before coming upon its track, the character of the ground and obstructions to the view at the place in question being involved, is admissible. *Id.*, 218

12. Evidence touching a parol contract is inadmissible, when the effect thereof would be to vary one in writing between the same parties. *Fowler v. Richardson*, 252

13. Evidence can not be admitted to prove that a provision was fraudulently omitted from an order, in the absence of verification by affidavit in conformity with Sec. 34 of the Practice Act. *Aultman & Co. v. Henderson*, 331

14. There can be no waiver of the rights of an insane defendant touching the introduction of the evidence of an incompetent witness. *Huling v. Huling*, 519

15. Such introduction is not cured by the fact that the testimony of the insane defendant was admitted without objection. *Id.*, 520

16. It is improper, in an action by a wife against the parents of her husband for the recovery of damages alleged to have arisen through the alienation of his affection from her by reason of acts and advice on their part, to allow her to testify to conversations between herself and husband touching their living together and the attitude of his parents toward them. *Id.*, 520

EXEMPTIONS.

1. The owner can not, under the statute concerning exemptions, become entitled to the possession of property held under a distress warrant, without first making out and delivering the required schedule. *Ehle v. Deitz*, 547

2. An appraisal in an action of this character must show that the persons making the same were legally appointed. *Id.*, 547

FEEs.

1. Where a circuit clerk has actually collected as fees of his office a sum equal to or greater than his salary, but has out of such sum paid deputy hire and other necessary expenses of his office, so that the amount unexpended is not sufficient to pay his salary, the county board has no power under the statute to allow him fees in criminal cases sufficient to make up the balance of his salary. *McLean v. County of Montgomery*, 131

FEES. Continued.

2. Where a county board has audited and allowed the payments made by a clerk for deputy hire and other expenses of the office, thereby reducing the sum actually collected by the clerk as fees below the amount necessary to pay his salary, and afterward, contrary to the statute, allowed him fees in criminal cases to make up the deficiency, the county is not estopped from recovering such illegal allowance.

Id., 131

3. Where a treasurer of a board of education has voluntarily paid to his successor in office the amount of money in his hands, including the amount he might be entitled to hold as commissions, under the statute, he can not subsequently, having been again elected to the office, retain from his then successor, the commissions on the funds handled by him during the first period for which he held the office. He can only retain the commissions out of the funds of the current year. *Bunn v. The People*, 410

FERRIES.

1. A private statute granting a ferry privilege, and containing the provision that a certain city shall have the right to regulate and control the rates of toll, implies that such regulation shall be reasonable. *Rohn v. Beardston*, 407

2. In the case presented this court holds that, in view of the evidence, the judgment of the court below, upholding as reasonable the rates established by the city which are herein complained of, should not be disturbed. *Id.*, 407

FIXTURES—See REPLEVIN.**FORCIBLE DETAINER.**

1. In a suit of forcible detainer, evidence as to title, introduced merely for the purpose of showing the character or extent of a possession, may properly be considered. *City of Bloomington v. Brophy*, 400

2. The owner of land having a present right of immediate possession, may enter the same in a peaceable manner, though occupied by another, without becoming by reason of such entry a trespasser. *Id.*, 400

FORFEITURE—See INSURANCE, 6, 7.**FORMER ADJUDICATION—See ATTACHMENT, 1; CARRIERS, 4.**

1. In order that a former judgment shall amount to a bar to a subsequent suit, it is enough that the status of the action was such that the parties might have had their suit disposed of according to their respective rights, if they had presented all their evidence and the court had properly understood the facts and correctly applied the law. It either failed to present all his proofs, or improperly managed his case, or subsequently discovers additional evidence in his behalf, or if the court finds contrary to the evidence or misapplies the law, the judgment, until corrected or properly vacated, is as conclusive upon the parties as though it had settled their controversy in accordance with the principles of abstract justice. *I. C. R. R. Co. v. Miller*, 200

FORMER ADJUDICATION. *Continued.*

2. It *seems* that the present suit is not barred by the former one, and that the statute in regard to consolidation of causes of action has no application. *Ehle v. Deitz*, 547

3. Upon the reversal of a decree by this court and the remanding of the case to the court below without directions, it is only bound by the law as determined by this court, and as to such matters of fact, passed upon by this court, as were not changed upon the rehearing by additional evidence, and to that extent only can the case be said to be *res adjudicata*. *Magnusson v. Charlson*, 581

4. It is unnecessary for this court to pass upon the admissibility of evidence, admitted by the chancellor upon the hearing before him, a court of equity being presumed to determine cases upon *competent* evidence alone. *Id.*, 581

FRAUD—See ADMINISTRATION, 2, 3; CORPORATIONS, 2; DECEIT; EVIDENCE, 13; NEGOTIABLE INSTRUMENTS, 5; PRACTICE, 11; WITNESSES, 1.

FRAUDULENT CONVEYANCES—See HUSBAND AND WIFE, 2, 3.

GAMING.

1. A stakeholder who, before the wager is or can be decided, pays the money over to one of the parties, makes himself liable to the other party for the amount of his deposit. *Brewer v. Gobble*, 115

GARNISHMENT—See PARTIES, 3.

1. The expression, "choses in action," in the provisions of the statute in regard to garnishment, refers only to those in the custody, charge or possession of the garnishee belonging to the defendant, and held against third parties. *Burgess v. Capes*, 372

GUARANTY.

1. Upon an assignment of a contract for the purchase of real estate, executed by the vendee, which provided that the agreement was thereby sold by the plaintiff to the defendant, the latter to assume all the conditions contained in the original contract, the assignment also containing the terms of payment by the assignee to the assignor, this court holds that the assignor did not thereby guarantee that the vendor in the original contract would faithfully perform. *Grote v. Clerihan*, 323

GUARDIAN AND WARD.

1. A guardian's report though not in precise form will be sufficient if it clearly shows the rights of the ward. *Cheney v. Roodhouse*, 49

2. A guardian is not properly chargeable with interest after he has tendered to the judge of the County Court the funds in his hands, and has been instructed to place the same in bank until further orders. *Id.*, 49

3. A guardian, by making repairs and improvements on his ward's lands without a previous order of court, does not lose the right to be repaid for them, but does assume the burden of showing, on application for credit therefor, that they were necessary and proper, to the interest of the ward and paid for at reasonable rates. *Id.*, 49

GUARDIAN AND WARD. *Continued.*

4. Upon the citation of a guardian to make a report at the instance of the administratrix of the ward, this court holds that a settlement between the guardian and ward at about the time the latter became of age, she being in poor health, uneducated, of weak mind and under the influence of her guardian, can not stand. *Condon v. Churchman*, 317

5. On appeal to the Circuit Court from an order of a county judge, entered on the hearing upon a citation to a guardian, the case does not become a chancery proceeding merely because it is referred to a master to take testimony, and the judgment is called a decree and is in form appropriate to chancery proceedings. *Id.*, 317

HIGHWAYS.

1. Commissioners of highways in towns organized under the township organization law can not be compelled by *mandamus* to build a bridge in place of one that has been entirely destroyed. *People v. Commissioners of Highways*, 164

2. Whether or not a bridge should be built at a given time and place is a matter of opinion. The duty of building is a matter of discretion with the commissioners, and such discretion is not to be controlled by the courts. *Id.*, 164

3. There is no provision authorizing an appeal from an order establishing a public road (not a cartway) in the present road law relating to counties not under the township organization law, and the only appeal that is provided for in such cases is from the assessment of damages and the judgment thereon. *Lockman v. County of Morgan*, 414

HUSBAND AND WIFE—See EVIDENCE, 16.

1. Upon a petition under the statute by a wife for separate maintenance, this court declines to interfere with decree for complainant. *Obrock v. Obrock*, 149

2. The husband may prefer the claim of his wife to that of other creditors. *Fleming v. Weagley*, 183

3. In the case presented, this court holds that there was no sufficient evidence to impeach the conveyance to the wife as fraudulent, the creditor not having any lien at the time the conveyance was made, and there being evidence to show that the property in question was purchased with funds derived from the wife's estate. *Id.*, 184

4. Where a wife renders valuable services to a third party, he can not defeat a claim for compensation on the ground that she is a married woman, owing all her time to her husband and family. Such an objection can come only from the husband. *Bedford v. Bedford*, 460

5. A parent may in good faith and from worthy motives, in a moderate, temperate and careful manner, advise his son as to his domestic affairs without incurring liability, if the same influences a separation between son and wife. *Huling v. Huling*, 520

6. An instruction in behalf of the plaintiff in such case ignoring the relation of father and son and the question of good faith, is bad. *Id.*, 520

INFANCY—See MORTGAGES, 3.

INJUNCTIONS—See MUNICIPAL CORPORATIONS, 15.

1. Where, in an action against a railroad company in a justice court, the summons was served properly, and judgment was rendered against the company, equity will not enjoin the collection thereof on the ground that the return on the summons was not properly made by the constable. *P. D. & E. Ry. Co. v. Duggan*, 351

2. Upon a bill asking that defendants be enjoined from interfering with certain excavations, it is *held*: That under the contract between the parties the plaintiff had no right to excavate at the controverted point without permission of defendants, that his remedy, if any, for the defendants' refusal to allow him to excavate at the desired point was at law, and that equity had no jurisdiction in the premises. *Thompson v. Weeks*, 642

INSTRUCTIONS—See NEGOTIABLE INSTRUMENTS, 8; RAILROADS, 23, 24; APPEAL AND ERROR, 7; CRIMINAL LAW, 1; HUSBAND AND WIFE, 6; INSURANCE, 5.

1. On appeal from judgment for plaintiff in an action to recover damages for injury to minor from bite of a dog, it is *held*: That whether or not an instruction on the measure of damages was incorrect is immaterial on either of two grounds: 1st. That no point was made in the court below on motion for a new trial that the damages were excessive. 2d. That the damages were not excessive, hence the defendant was not injured by the instruction, even if erroneous. *Linck v. Scheffel*, 17

2. Instructions which placed plaintiff, a child of seven years, virtually upon the same plane of care and diligence as an adult, should be refused. It is for the jury to determine from the age and intelligence of the child whether he used due care or not. *Id.*, 17

3. It is not error for the court to refuse certain instructions, although they contain a correct statement of the law on the topics covered by them, where the jury are elsewhere properly instructed on the same points. *McNary v. The People*, 58

4. The phrase, "a considerable time," is too indefinite for use in instructions to a jury. *City of Hoopeston v. Eads*, 75

5. Where the proof on the part of the plaintiff is inconclusive as against a strong defense made by the city, in an action for alleged negligence, it is specially important that the instructions given should be accurate and not conflicting. *Id.*, 75

6. Refinements in verbal criticism upon instructions are not to be encouraged and will not lead to the reversal of a case where it appears that the jury were not misled. *McNulta v. Lockridge*, 86

7. It is not error for the court to decline to give instructions which are but repetitions in substance of those already given. *Id.*, 86

8. The use of the word "testimony" instead of "evidence," in an instruction to the jury, is not error. *Welch v. Miller*, 110

9. In an instruction to the jury, the omission of the qualification that false testimony must be with regard to a material matter in issue

INSTRUCTIONS. *Continued.*

in order to justify the jury in disregarding the whole testimony of a witness whose testimony is false in part, does not constitute reversible error, where it is apparent that all the supposed false testimony to which the instruction referred was upon material points. Minor exceptions to instructions overruled. *Butz v. Schwartz*, 156

10. A clause in an instruction saying that the party producing a witness "is not permitted afterward to deny that such witness is worthy of belief," is ambiguous and erroneous, and in the circumstances of the case presented, tended to mislead the jury. *McFarland v. Ford*, 173

11. Although instructions given to a jury might, as abstract propositions of law, require qualification, yet such qualifications may be rendered unnecessary by undisputed evidence in the case. *Leinweber v. Forest City Ins. Co.*, 190

12. In an instruction on the subject of the engineer's duty to keep a lookout for obstructions upon the track, the phrase "ordinary care" would be presumed to mean such care as the engineer could reasonably exercise in keeping a lookout, taking into consideration his other duties. *I. C. R. R. Co. v. Burns*, 116

13. An instruction setting forth that the jury in determining the credibility of witnesses should take into consideration their interest in the result of the suit, and the relationship of any of them to either party to the suit, or any other feeling or interest they may appear to have in the case, is proper. *Brown v. Walker*, 199

14. In an action by a party alleged to have been injured by the careless handling of a truck by a baggageman upon a depot platform, where certain instructions did not pretend to determine the liability of appellant under the circumstances shown, but merely laid down the general principles of care required of appellant's servants, this court holds that the omission to state in such instructions that, in order to recover, the appellee must himself have been in the exercise of due care, was not erroneous. *C. & A. R. R. Co. v. Woolridge*, 237

15. A clause in an instruction setting forth "that gross negligence is defined by the law to be wilful or intentional negligence," is erroneous. *J. S. Hy. Co. v. Southworth*, 307

16. An instruction in behalf of defendant, ignoring one of the disputed facts upon which plaintiff based his claim, may be modified by the trial courts. *Id.*, 307

17. Although the principles announced in certain instructions are correct, as applied to a proper case, yet where they are not applicable to the case at bar, and are contradictory to other instructions given, and tend to confuse and mislead the jury, the giving of them constitutes reversible error. *City of Litchfield v. Ward*, 292

INSURANCE.

1. Upon hearing on a demurrer to a plea to the jurisdiction, the plaintiff is bound by the material averments of the declaration, but not so the defendant, further than they are admitted by the plea. If any

INSURANCE. *Continued.*

matter of fact contained in the plea is to be denied, or if there is any matter of fact that in law would avoid the *prima facie* effect of the plea, it should be presented by replication, whatever may appear in the declaration. *N. W. Life Ass'n v. Stout*, 31

2. In an action brought upon a certificate issued by a mutual benefit association, defendant filed a plea to the jurisdiction, alleging "that it is, and at all times since its organization has been, an association intended to benefit widows, orphans, heirs and devisees of deceased members thereof, and no annual dues are required and the members receive no money for profit or otherwise. That the location and principal place of business of the said association is, and ever since the organization thereof has been in the city of Bloomington, in the said county of McLean, and not at any time in the said Greene county," and that the defendant had not been served with process in Greene county, but had been served in McLean county: *Held*, that the plea should have been held good on demurrer. *Id.*, 31

3. In the case presented, this court holds that the plea was sufficient to bring the defendant within the meaning of Sec. 31 of the act concerning corporations, and to show that it was therefore not to be deemed an insurance company within the meaning of Sec. 3 of the practice act, providing that the Circuit Court of the county where the plaintiff resided should have jurisdiction of all actions to be commenced against any fire or life insurance company. *Id.*, 31

4. In an action on a certificate of membership in a mutual benefit association this court holds that the answers in the application were, as matter of law, unconditional warranties, and that evidence tending to show their simple untruth, without regard to the knowledge or good faith of the insured or beneficiaries, was admissible. *Morgan v. Bloomington Mut. Life Benefit Ass'n*, 79

5. In an action brought to recover upon a fire insurance policy this court holds as erroneous an instruction given in behalf of plaintiff, the question involved being as to whether certain extensions of time for the payment of the premium note amounted to a waiver of conditions in the note and policy setting forth the necessity for the prompt payment thereof. *Phoenix Ins. Co. v. Carlock*, 255

6. When the practice of an insurance company and its course of dealing have been such as to induce the belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted upon, the company will not be allowed to set up such forfeiture as against one in whom their conduct has induced such belief. *Penn. Mutual Life Ins. Co. v. Keach*, 427

7. An insurance company may permit its agent to waive a forfeiture notwithstanding provisions in its policies that agents shall have no such authority. *Id.*, 427

8. In the case presented, this court holds that the evidence warranted the jury in the conclusion that the insured and the agent had an understanding binding upon both, in regard to a certain premium; that payment thereof was waived and postponed until a date which was

INSURANCE. Continued.

later than the death of the assured, and that the acts of the agent were binding upon his company. *Id.*, 427

9. A person named as the beneficiary in a life insurance policy obtains a vested interest therein, which can not be affected by any subsequent act of the assured. *Hubbard v. Stopp*, 541

10. A life insurance policy can not be assigned without the consent of the company. *Id.*, 541

11. Where the assured has paid the premiums on a policy in favor of a third person with funds embezzled from another, such payments are a lien on the policy; and if the one from whom such funds have been embezzled pays subsequent premiums, the same, with interest, also constitute a lien on the policy. *Id.*, 541

INTEREST—See **BANKS, 1; CORPORATIONS, 3; GUARDIAN AND WARD, 2; NEGOTIABLE INSTRUMENTS, 2.**

JUDGMENT AND DECREES—See **ADMINISTRATION, 4; FERRIES, 2; FORTHER ADJUDICATION, 1; GUARDIAN AND WARD, 5; REPLEVIN, 5.**

1. Where a judgment has been discharged of record, by a party acting without authority from the judgment creditor, the dismissal of a bill filed in another county from that in which the judgment was rendered to annul such discharge, does not act as an adjudication upon the validity thereof. *Jones v. Hunter*, 445

2. In the case presented, it is held: That the acceptance of \$1,000 by the judgment creditor for the assignment of his interest in the judgment, to one alleged to be in community with the party who discharged the judgment without authority, did not, under the circumstances, act as a ratification of such discharge. *Id.*, 445

3. The presumptions are always in favor of the correctness of the judgments of courts of common law having general jurisdiction. *Riley v. Brown*, 524

4. The decree can not find more than is charged in the bill. *Hubbard v. Stopp*, 541

JURISDICTION—See **ADMINISTRATION, 5; GUARDIAN AND WARD, 5; INCORPORATIONS, 2; INSURANCE, 3; MUNICIPAL CORPORATIONS, 1, 2; PARENT AND CHILD, 3.**

1. The Circuit Court of one county has no power, upon a bill filed for that purpose, to annul or anna an unauthorized satisfaction of a judgment entered by the Circuit Court of another county. *Burney v. Hunter*, 441

LACHES

1. Whether or not the complaining party in an equity suit has been guilty of such laches as to bar his right to relief depends largely upon the circumstances of the particular case, and the final decision of the question is largely committed to the chancellor. *Fleming v. Fleming*, 183

LANDLORD AND TENANT.

1. A bona fide purchaser of farm crops from a tenant, takes them subject to the lien of the landlord under the statute, for unpaid rent.

LANDLORD AND TENANT. *Continued.*

The statute itself gives to such purchasers of this class of property sufficient warning to put them on inquiry. *Finney v. Harding*, 98

2. A lessee of farm lands, the relation being entered into pending an appeal by his lessor from an adverse decision in an action of ejectment involving the land in question, can not hold the crops raised thereon, though severed from the soil, where the judgment in behalf of the plaintiff in such suit is affirmed in the higher court. *McGinnis v. Fernandes*, 424

3. Upon suit to recover possession of leased coal lands, it is *held*: That the words in the lease fixing the date for the payment of the rent, were merely to fix dates for settlement, and did not bind the lessees absolutely to mine coal before those days; that the lessees were not bound to open the mine by means of a shaft upon the land itself; that it was their right, if they so preferred, to open the mine by means of a shaft and a subterranean drift started upon other land, provided they prosecuted such work with reasonable diligence, and that the trial court properly found that the lessees used reasonable diligence to open the mine. *King v. Edwards*, 558

LIBEL—See **SLANDER AND LIBEL**, 1.

LIENS—See **INSURANCE**, 11; **LANDLORD AND TENANT**, 1; **NEGOTIABLE INSTRUMENTS**, 3.

LIMITATIONS—See **MUNICIPAL CORPORATIONS**, 14; **NEGOTIABLE INSTRUMENTS**, 1; **PARTNERSHIP**, 2; **PRACTICE**, 11.

1. The mere fact of a payment by a debtor owing an account of a sum not more than sufficient to cover items of recent origin, without proof of knowledge as to numerous items of older date, long barred by the statute, is not sufficient, *per se*, to relieve such barred items therefrom. *Crum v. Higold*, 282

2. An action on a judgment of a justice of the peace falls within the provisions of Sec. 15 of the statute of limitations and is barred in five years. *American Ins. Co. v. Arbuckle*, 369

MANDAMUS—See **HIGHWAYS**, 1, 2; **RAILROADS**, 5; **SCHOOLS**, 1, 3.

MASTER AND SERVANT.

1. The question whether one servant was the fellow-servant of others in the employ of the same master, is for the jury. *Joliet Steel Co. v. Shields*, 598

2. In an action brought by a servant to recover from his employer for the loss of a leg through the alleged negligence of other servants of his said employer, this court holds, that the declaration after issue joined sufficiently disclosed a cause of action; that plaintiff was not a fellow-servant of those through whose negligence the accident occurred; that when injured he was in the exercise of ordinary care; that the instructions given for him were not seriously defective, and declines to interfere with the verdict in his behalf. *Id.*, 598

MECHANIC'S LIEN.

1. Upon a petition to enforce a mechanic's lien, it being stipulated that no liens that any of the parties holding claims against the common

MECHANIC'S LIEN. *Continued.*

debtor might have, should be lost or postponed by reason of delay during the pendency of the suit, and that the rights of the respective parties should be determined in the cause, this court holds that the stipulation was a sufficient basis on which to afford relief, and found a decree determining and enforcing the rights of the parties without the necessity of cross-bills, and that the decree of the court below denying the petition, was supported by the evidence, the materials in question not having been furnished within one year, as required by Sec. 3, Chap. 82, R. S. *Harwood v. Brownell*, 347

MINES—See LANDLORD AND TENANT, 3.**MORTGAGES**—See PRACTICE, 22; REPLEVIN, 2, 3.

1. In the case presented, it having been determined in a chancery proceeding between the same parties that a note and chattel mortgage had been given by appellees to appellant to secure the performance of an original agreement between the parties, and that appellees had not complied with their part of it, this court holds that appellant was entitled to hold the property covered by the mortgage, or so much thereof as would cover the costs and expenses occasioned by appellees' failure to comply with their contract. *Prince v. Dulin*, 118

2. Upon a bill to foreclose a mortgage, it being contended that the note it was given to secure had been paid, the evidence being sharply conflicting and the credibility of the witnesses of prime importance in the consideration of the case, this court declines to interfere with decree for plaintiff. *Dolan v. Farrell*, 144

3. In proceedings to foreclose a mortgage executed under the approval of the County Court, conveying the property of minor heirs, they can question its validity. *Kingman v. Harmon*, 529

4. The purchaser of incumbered lands is not estopped from denying the validity of a mortgage thereon merely because he prepared the petition to the County Court to procure leave to mortgage, and advised the mortgagee, though not as his attorney, that the loan contemplated would be a safe one. *Id.*, 529

5. In the case presented, the interest of the widow in the purchase money of the premises in question, due the estate of her deceased son, can not be reached in the foreclosure proceedings upon the mortgages being declared void. *Id.*, 529

6. The petition of a mortgagee, in a mortgage executed *pendente lite* by the complainant, in an action brought to have defendant's title declared an equitable mortgage, the mortgagee being complainant's solicitor, for the right to intervene, the petition having been filed after issues joined, and the report of the master filed, was properly dismissed by the court below. *Magnusson v. Charlson*, 580

MUNICIPAL CORPORATIONS.

1. Upon a bill in chancery filed by three village trustees to prevent another from exercising the functions of such office, it is held: That the evidence failed to support the allegations of the bill; and that the bill failed to present grounds for equitable jurisdiction. *Hilligoss v. Grinslade*, 45

MUNICIPAL CORPORATIONS. *Continued.*

2. Where, by express statutory provision, the president and trustees of a village are vested with the power to judge of the election and qualifications of their own members, the exercise of this power is one of the public duties of the board, and chancery will not interfere therewith where no property rights, strictly considered, are concerned.

Id., 45

3. In an action against a city for an injury received from a defective sidewalk, the burden is on the plaintiff to prove due care. *City of Hoopston v. Eads*, 75

4. The duty of a city to keep its sidewalks in repair is not an absolute one. Reasonable diligence in that behalf is all that is required.

Id., 75

5. The erection by a city of an embankment in a highway fourteen feet high and thirty feet wide, a street car track with rails three inches high running just to one side of the center line thereof, constitutes negligence. *City of Danville v. Mekemson*, 112

6. The fact that the city has other streets, perfectly safe, which the plaintiff might have used, can not be urged in defense to an action for the recovery of damages for an accident due to its negligence. *Id.*, 112

7. Where a person, in the exercise of due care, is injured by the combined result of accident and negligence of a city, and the injury would not have occurred but for such negligence, the city will be liable.

Id., 112

8. Where an injury is the result of accident and the fault of the defendant combined, and each is necessary in the combination to produce the injury, the defendant is liable therefor. *City of Champaign v. Jones*, 179

9. In an action against a city for alleged negligence in the care of its streets, where the evidence showed that, on the first of March, the mud and slush had been scraped to the middle of the street, and allowed to remain there in a ridge over night, when it froze, and was not removed for a week, when the accident occurred, this court holds that the jury were warranted in finding that the city was guilty of negligence. *Id.*, 179

10. Canvassing or taking orders for books, pictures, etc., is not peddling or hawking within the meaning of the statute authorizing municipal corporations to license or prohibit the same. *Rawlings v. Village of Cerro Gordo*, 215

11. An ordinance providing that a person engaged in canvassing or taking orders shall be required to take out a peddler's license, is void.

Id., 215

12. In a prosecution under a municipal ordinance touching conduct likely to frighten horses and embarrass the passage of vehicles, this court declines, in view of the evidence, to interfere with the judgment against the defendant. *Mashburn v. City of Bloomington*, 245

13. A city is powerless to confer a right so to use its streets as to hinder or obstruct the concurrent use by the public thereof. *C. & Q. R. R. Co. v. City of Quincy*, 377

MUNICIPAL CORPORATIONS. *Continued.*

14. While statutes of limitation do not run against municipal corporations as to public rights, the principle of estoppel *in pais* may be so applied. *Id.*, 377

15. In an action brought to enjoin a railroad company from placing obstructions in certain portions of city streets, the deed under which the company claimed the right to act in the premises containing a provision that they, or portions thereof in which any right and privileges were granted to the company, should be by them so graded and their tracks so laid, that carriages, wagons, drays and vehicles of all kinds might conveniently cross the same, it is *held*: That the decree in behalf of the plaintiff was within the provisions of the deed, and that the same was supported by the evidence. *Id.*, 377

16. In an action by a city employe to recover from the municipality compensation for assistance rendered him by his minor son, this court holds that the right of recovery depends upon the amount of steam power furnished a company named, in accordance with a resolution passed by the city council. *City of Litchfield v. Ward*, 392

17. In an action of debt for the recovery of penalties for divers violations of an ordinance touching the sale of intoxicating liquors, this court holds as erroneous the assessment of attorney's fees in a certain sum upon each conviction, as costs. *Gipps Brewing Co. v. City of Virginia*, 518

18. A failure to allege in the declaration the existence of a provision warranting such assessment in an ordinance, will prevent the recovery thereof. *Id.*, 518

19. In a declaration, in an action against a city to recover damages for the death of a person killed by the bursting of a cannon in a public street, the allegation that the defendant did knowingly, wrongfully and negligently permit, etc., etc., will, taken in connection with the rest of the declaration, be construed to mean that the permission charged was the failure of the city to interfere and stop the acts complained of, and not a positive permission given in advance. *Arms v. City of Knoxville*, 604

20. The negligence of police or peace officers in failing to stop the firing of a cannon, known to be dangerous, upon the streets of a city, does not render the city liable to the administratrix of a person killed as the result of such negligence. *Id.*, 604

NEGLECTANCE—See INSTRUCTIONS 2, 5, 15; MUNICIPAL CORPORATIONS, 5, 6, 7, 9, 20; RAILROADS, 21.

1. The use of a young and inexperienced horse does not necessarily constitute negligence. *City of Danville v. Makemson*, 112

2. It does not constitute negligence, as a matter of law, for a passenger waiting for a train at a depot to go upon the platform before it is necessary for him to board the same. He is not required to remain in the waiting room. *C. & A. R. R. Co. v. Woolridge*, 237

NEGOTIABLE INSTRUMENTS—See WITNESSES, 1, 2.

1. Where indorsees of a promissory note, on which the statute of limitations had run, indorsed upon its back an agreement to accept a

NEGOTIABLE INSTRUMENTS. *Continued.*

sum less than the amount for which it was given, in full satisfaction thereof, during the current year, and the maker wrote below "I accept the above condition" and signed his name, this court holds that the act in question constituted a valid contract on which an action would lie at its maturity. *Whittaker v. Crow, Hargadine & Co.*, 29

2. Interest at six per cent (the original note providing for interest at ten per cent) should be allowed after the maturity of the new contract. *Id.*, 29

3. Upon a bill to enforce a vendor's lien for a purchase money note, the decree of the Circuit Court is affirmed, the sole question being as to alleged payment thereof. *Martin v. Field*, 66

4. The guarantor of a promissory note given to a bank can not defend in an action against him on the same by the bank, on the ground that the maker, a corporation which had been a depositor of plaintiff, had funds in the bank sufficient to pay the note, where the only basis for such claim is that the bank had credited itself with certain checks, paid by it, but which were irregularly signed, the same having been made and used by the officers of the corporation in its business and for its benefit, and where some months had elapsed since the payment of the checks (the bank book of the depositor having been several times balanced) and the bank had received no notice of dissatisfaction until the bringing of suit. *Metropolitan National Bank v. Race*, 126

5. In an action on a promissory note given for the premiums on policies of insurance, to which the defense was that the company's agent fraudulently misrepresented to defendant the contents of the application signed by defendant at the time the note was given, the weight of the evidence being strongly against the truth of the allegations of fraud, this court declines to interfere with verdict for plaintiff. *Leinweber v. Forest City Ins. Co.*, 190

6. Where a payee places his name with the maker on the face of a note for the purpose of constituting himself a joint maker, such signature can not be treated by a third party as a blank indorsement. *Coates v. Harmon*, 204

7. If a payee signs a note at the time it is executed by the maker, and upon an understanding that it shall only serve as a memorandum between them, no subsequent statement by the payee, in the absence of the maker, will render the latter liable to a third person. *Id.*, 204

8. In the case presented, this court holds that certain instructions given in behalf of plaintiff, touching indorsements in blank, should have been so qualified as to show that the position of the signature of the payee raised no presumption that it was intended as an indorsement, and that one refused on behalf of defendant, touching, among other things, the alleged understanding upon which the payee's signature was written, should have been given. *Id.*, 204

9. A clause in a promissory note, executed in this State, February 12, 1876, providing for "interest payable annually, and if not so paid to become principal and bear the same rate of interest," was not usurious, and was within the contracting power of the parties. *Borman v. Neely*, 356

NEW TRIAL.

1. A special finding by a jury on one question of fact directly contrary to the evidence, should lessen the confidence of the court in their judgment on other points. *McFall v. Smith*, 463

2. Where questions, not properly arising upon the evidence, are so mingled before the jury with the real issue in the case as to render it doubtful upon what ground the jury based their verdict, the same should be set aside. *Id.*, 463

3. Hypothetical questions to experts, not fairly based upon the evidence, and which have a tendency to mislead and prejudice the jury, are to be considered by the court in determining whether a new trial should be granted. *Id.*, 463

NOTICE—See LANDLORD AND TENANT, 1; PRACTICE, 5.

OPTIONS—See CONTRACTS, 5.

PARENT AND CHILD—See HUSBAND AND WIFE, 5. 6.

1. An appeal to the Circuit Court will not lie from an order entered by the County Court for the adoption of a child under the provisions of chapter 4, R. S. *Meyers v. Meyers*, 189

2. It is the duty of a father, if his means are sufficient, to maintain and educate his children during their minority according to their station, even though the children have separate estates, and the burden is on him to show the necessity of contribution from the children's estates. The circumstances of father and children are to be considered in deciding what, if any, contributions should be made. *Bedford v. Bedford*, 455

3. In the case presented, this court holds that the County Court, in allowing a claim against the estate of claimant's father for the use by him of land left by the deceased mother, and in passing upon counter-claims thereto, had equitable jurisdiction. *Id.*, 455

4. In the case presented, this court holds that the circumstances proved sufficiently raised an implied promise on the part of a father to pay for the support of his infant child. *Bedford v. Bedford*, 460

PARTIES.

1. Where an injury is received through the negligence of the servants of a railroad corporation, in the hands of a receiver, the action for such injury is properly brought against the receiver of the company at the time the action is brought, though he was not the receiver at the time the accident occurred. *McNulla v. Lockridge*, 86

2. A suit against a common carrier may be maintained in the name of any person having either a general or special property in the goods involved, and an action properly brought by such person will be a bar to any subsequent suit against the carrier by another party having either a general or special property in the same goods for the same damages. *I. C. R. R. Co. v. Miller*, 259

3. The nominal plaintiff in a garnishee proceeding before a justice of the peace is a party to the suit, and has the right of appeal from the judgment rendered by the justice. Such plaintiff has also the right to appeal to this court from an order of the Circuit Court dismissing his appeal. *Murphy v. Consolidated Tank Line Co.*, 612

PARTNERSHIP.

1. Upon the dissolution of a partnership between appellant and appellee, and the settlement of the partnership affairs, an agreement was signed, which provided that appellant should pay appellee \$2,154.30 for his entire interest in the business and property of the firm, including all interest in the book accounts due said firm, and pay all unpaid debts or claims against it. There was present a book of accounts showing \$1,975 due the firm, which appellee, who had been the bookkeeper, said "was in the neighborhood of correct." Appellant afterward learned that a considerable amount of these accounts had been paid to appellee. Upon action brought by appellee to recover the unpaid balance of the amount provided by the above agreement, in which the defense was partial failure of consideration, it is held: That appellee had purchased, not an interest in a definite amount of accounts, but appellee's interest, whatever it was; and that the question whether appellee was guilty of deceit, was one of fact, and the judgment of the trial court would not be disturbed on that point. *Mentzer v. Robinson*, 151

2. Upon a bill filed to secure the settlement of a partnership, and for an accounting, although the same had been finally dissolved more than five years previous thereto, this court holds that the statute of limitations did not bar the relief asked, it appearing that within that time there had been consultations as to unsettled matters, requests and promises to account, and credits and charges by defendant, who was settling the partnership business against complainant on account of partnership claims collected and paid by him. *Randolph v. Inman*, 246

3. Upon a bill filed to settle a partnership, this court is unable to determine from the record the basis upon which the trial court decided certain questions presented, and therefore reverses the decree and remands the cause with directions, to the end that the matters in dispute may, upon another trial, be finally disposed of. *Miller v. Dyas*, 385

4. Upon a bill filed by a member of a firm, calling, among other things, for an itemized statement of payments made with partnership funds, by a defaulting copartner, to liquidate private debts due manufacturers with whom such firm habitually dealt, suit having been brought by them against the firm to recover a balance due and unpaid, and that such payments be applied in satisfaction of the firm indebtedness, this court holds that the promise of complainant to assume such payments was conditional, not absolute, and declines to interfere with the decree in his behalf. *Warder v. Sweetser*, 567

5. Upon suit brought by a former member of a defunct copartnership against a firm succeeding it in business and assuming its liabilities, to recover for payments made by him of certain liabilities of the old firm after the formation of the new one, this court holds that by a contract executed subsequently to the payments in question, plaintiff had released the defendants from liability upon certain items named, and that no recovery could be had therefor. *Martin v. Rhca*, 636

PERSONAL INJURIES:—See EVIDENCE, 4; MASTER AND SERVANT, 2; MUNICIPAL CORPORATIONS; RAILROADS.

PLEADING—See INSURANCE, 1, 2, 3; MUNICIPAL CORPORATIONS, 18, 19.

1. In an action against a receiver, in his representative character, allegations in the declaration of the orders of court appointing the defendant and his predecessor, are admitted by a plea of the general issue and need not be proved. *McNulta v. Lockridge*, 86

2. In an action to recover damages for an injury inflicted on plaintiff's horse by the bull of defendant, it is held: That the averment that by reason of the negligence and default of the defendant in failing to keep his part of a line fence in repair, the horse passed into defendant's pasture and was gored, was a sufficient averment that the result charged were caused by his negligence. *Burke v. Daley*, 326

POWERS.

1. The recital in a power of attorney of the specific purpose for which it was given, to wit, to collect a debt due the constituent, and with the proceeds pay an obligation of his, does not affect its character as a naked power, nor presently divest or invest an interest in the fund, and the collection by the attorney, after the death of the constituent, of the debt and the application of the proceeds to the payment of the specified obligation of deceased, does not release deceased's debtor from subsequently paying the administrator. *Garber v. Meyers*, 175

PRACTICE—See APPEAL AND ERROR; CONTRACTS, 2; FORMER ADJUDICATION, 2, 3, 4; INJUNCTIONS, 1; INSTRUCTIONS, 1; NEW TRIAL; PARTIES, 3; RAILROADS, 4; REPLEVIN, 5; SPECIAL INTERROGATORIES, 1.

1. A judgment in favor of the plaintiff in an action of replevin having been affirmed by this court, a stipulation was filed in the court below to waive order of affirmance, reinstate the case and submit it to the judge of the court: Held, that an appeal would lie from the judgment entered upon trial under the stipulation. *Prince v. Dulin*, 118

2. Although a motion appears in the record, yet where it bears no file mark and it does not appear that it was brought to the attention of the court below, no error can be held to have been committed regarding it. *Ritchie v. Village of Warrensburg*, 181

3. Where, on trial in the County Court of an appeal from a justice, papers are missing, which the transcript shows to have been issued by the justice, the proper practice is to issue a rule on the justice to send them up, or if they have been lost to require the plaintiffs to supply copies. *Id.*, 181

4. An objection to the admission of evidence can not be urged here, the same not having been specifically called to the attention of the trial court. *Id.*, 181

5. A paper filed by a third party in an equity case, purporting to be a cross-bill, without leave of court, is not constructive notice to the parties to the action of the claims therein set up. *Fleming v. Weengley*, 183

6. The clerk of the Circuit Court may, in vacation, at the request

PRACTICE. *Continued.*

of the State's attorney, issue subpoenas for witnesses to appear before the grand jury at the ensuing term of court. *O'Hair v. The People,*

277

7. An appeal to the Circuit Court from an order entered by the County Court, on petition of an administratrix to sell real estate, may be granted at any time during the term. The time for appeal is not limited to twenty days. *Lewis v. Flourree,*

314

8. This court will not reverse a judgment merely for the purpose of permitting the recovery of nominal damages. *Meyer v. Hense, Goodell & Co.,*

328

9. This court will not interfere with the judgment of the trial court where the bill of exceptions fails to show a motion for a new trial made, or exception to the judgment entered. *Griffith v. Welsh,*

396

10. It is not error for the jury to fail to find and return in their verdict under what count of the declaration they find a defendant guilty.

C. & A. R. R. Co., v. Elmore,

418

11. A request to find, in trial without a jury, that certain facts, if found to exist, would constitute such a fraudulent concealment as would prevent the statute of limitations commencing to run, should be refused, it being a question of fact, not of law. *O'Bannon v. Vigus,*

473

12. Requests to find, should present propositions of law only, and in no case assume the existence of any fact in dispute. Such propositions should deal with the facts claimed only as hypothetical, and should state no fact even hypothetically, unless there is evidence tending to prove it. *Id.,*

473

13. When the court is asked to hold a proposition of law, based upon a hypothetical case, it should be correctly and completely stated. *Id.,*

473

14. It is not error to refuse a proposition of law already embodied in another holding. *Id.,*

473

15. It is not error to refuse a proposition of law when there is nothing in the case calling for its application. *Id.,*

473

16. A certificate setting forth service by publication, should show that it was made by the publisher of the paper in which it appeared. *Risly v. Barton,*

524

17. A certificate imperfect in this respect may be cured by other proof of publication in the paper in question. *Id.,*

524

18. The remedy, in case of dissatisfaction with an assessment of damages on default, is a motion to correct the same. *Id.,*

524

19. This court will not review the assessment of damages on a default, in the absence of a bill of exceptions setting forth all the evidence heard. *Id.,*

524

20. An application for a continuance, made upon the amendment of the declaration, may be properly overruled, where the affidavit in support thereof is admitted in evidence by the plaintiff in accordance with the statute, and it does not appear that the defendant could have reasonably been prejudiced in his defense by the amendment. *C. & E. I. R. R. Co. v. Goyette,*

574

PRACTICE. Continued.

21. All parts of a verdict are to be so reconciled, if it can reasonably be done, as to support the general verdict. *Id.*, 574

22. In the case presented, this court holds that it was proper to require the complainant to pay into court within thirty days the amount found to be due to defendant; that the requirement was supported by the stipulation under which the accounting was had, and that as complainant was seeking to redeem from an alleged equitable mortgage he must be regarded in equity as bringing the amount due into court. *Magnusson v. Charlson*, 581

23. Where a party makes an effort to perfect his appeal from the judgment of a justice of the peace and files some sort of a bond, the same can not be dismissed because of imperfections in the bond until a rule has first been entered on the appellant to file a good one. *Murphy v. Consolidated Tank Line Co.*, 612

24. Where plaintiff's counsel waives the opening argument and the defendant's counsel thereupon waives argument, it is proper for the court to refuse plaintiff's counsel the right to address the jury. *Creeger v. Blank*, 615

25. The verdict of a jury upon a question of fact alone which has been fairly submitted, must stand, although it may appear to be against the weight of evidence, unless it is apparent on the face of the record that the jury were actuated by passion or prejudice. *Shelton v. O'Riley*, 641

26. An appeal will lie to this court from a judgment entered in an action of case for alleged negligence, where it is stipulated that a jury be waived; that proof of negligence be waived; that the case be submitted to a particular judge, and that when he shall have determined the compensatory damages, judgment shall be entered for one-half the amount so found. *Brown v. Galesburg Pressed Brick and Tile Co.*, 650

27. The same consideration is due to the finding of the court, in a trial without a jury, upon a question of fact, as to the verdict of a jury, and that finding will not be set aside unless manifestly against the weight of the evidence. *Id.*, 650

PRINCIPAL AND SURETY.

1. The sureties on the official bond of a constable are liable for illegal acts on his part while engaged in making an arrest. *Cash v. People*, 250

RAILROADS—See CARRIERS; EVIDENCE, 7, 10, 11; INSTRUCTIONS, 12, 14; MUNICIPAL CORPORATIONS, 15; NEGLIGENCE, 2; PARTIES, 1, 2.

1. In an action against a railroad company for damages to a team at a crossing in a village in which the negligence charged is a violation of an ordinance as to speed, a stipulation that the ordinance put in evidence "was duly certified under the seal of the corporation, as required by law," and that it was "duly passed and published as required by law," avoids the necessity of further proof that the ordinance was in force. *I. C. B. R. Co. v. Fishell*, 41

2. The failure of plaintiff to stop and look and listen before going

RAILROADS. *Continued.*

upon the track at the time of the accident can not be said, under the circumstances of the case presented, to constitute negligence as matter of law. *Id.*, 41

3. In an action against a railroad company for injuries to stock upon defendant's track, alleged to have been caused by the negligent management of one of its trains, this court declines to interfere with verdict for plaintiff. *P. D. & E. Ry. Co. v. Powell*, 53

4. In an action on a promise by the general freight agent of a railroad company to give a rebate on certain freight charges, it is held that the plea of said company, alleging that the promise was without authority and void under the statute against discrimination, should have been held good on demurrer. *I. D. & S. R. R. Co. v. Davis & Finney*, 67

5. Upon a petition for *mandamus* to compel a railroad company to build a sewer in accordance with the requirements of a city ordinance, this court holds that the allegations that the sewer was necessary to the proper drainage of the street in which it was to be built, and for the proper grading thereof, were essential under the terms of the original ordinances granting the right of way, by virtue of which it was sought to compel defendant to build the sewer, and therefore, that a denial of these allegations by answer, raised a question of fact necessary to be determined, and that the demurrer to the answer should have been overruled. *O. & M. Ry. Co. v. The People*, 69

6. In an action by a section hand against the railroad company employing him, to recover for injuries alleged to have been caused through the negligent management of one of its trains, this court holds that the judgment of the trial court in behalf of the plaintiff is unsupported by the evidence. *C., B. & Q. R. R. Co. v. Peterson*, 133

7. Where a passenger is ejected from a railway car for non-payment of fare at a place other than a station, he can not recover, as part of his damages, for injuries received, being in poor health, from unnecessarily walking to his home, several miles distant, when the station at which he boarded the train was within five or ten minutes walk of the point of ejection. *O. & M. Ry. Co. v. Burrow*, 161

8. It is the duty of trainmen to use ordinary care in looking ahead, and in discovering whether or not any obstructions are on the track. It is not sufficient to use due care after animals are discovered, if, by the use thereof, they might have been seen in time to avoid an accident. *C. & A. R. R. Co. v. Legg*, 218

9. In an action against a railroad company to recover for the overflow of plaintiff's lands, alleged to be due to insufficient culverts through defendant's embankment, it is held: That the mere ownership of the right of way by the defendant constituted no defense; that the right to build and operate the road carried with it the duty skillfully to construct; and that for injury caused by faulty construction the remedy is clear and may be applied as often as injury occurs. *O. I. & W. R. R. Co. v. Dooley*, 228

10. In the case presented, this court holds that the admission of

RAILROADS. *Continued.*

evidence as to the increased flow of water from tile drainage, for which defendant was not bound to provide outlet, was not reversible error, the jury having been clearly and correctly instructed, and the special findings showing that they followed the instructions given. *Id.*

228

11. In an action under Secs. 63-4, Chap. 114, R. S., providing penalties for the obstruction of highways by railroad corporations in leaving locomotives and cars at intersections thereof, it is unnecessary to allege that the corporation in question is the owner of the railroad. *I. & St. L. R. R. Co. v. People.*

286

12. Such corporation is liable, under Sec. 64, for the penalty provided therein for each offense alleged and proved in the action, the same as in the case of an engineer or conductor. *Id.*

286

13. An owner of real estate, located upon a highway, is entitled to damages when the same is rendered less safe with reference to communication with his property, through the building and operation of a railroad contiguous thereto. *L. E. & W. R. R. Co. v. Scott,*

292

14. There is no legal distinction between damages suffered in such manner and where the injury arises from the obstruction of the road itself. *Id.*

292

15. In such cases certain elements of damage arise, so far as such property owner is concerned, which are not fully shared by the general public. *Id.*

292

16. In an action against a railroad company to recover damages for an injury received by a person while riding on its road upon a complimentary pass, it is held: That a question to a juror by plaintiff's counsel as to whether, if it should appear in evidence that the plaintiff, when he received the injury, was riding on a pass, that fact would influence his verdict in the case, was not material error. *J. S. Ry. Co. v. Southworth,*

307

17. Where evidence tends to show a company's track to have been in the same condition shortly before and after the accident occurred, it raises a presumption that it was in such condition at the time thereof; and such evidence, if material, is admissible. *Id.*

307

18. The plain object of the statute requiring railroad companies to give signals at highway crossings is to protect persons who may be about to cross the track and to obviate danger of collisions. Failure to comply with the statute does not render a company liable to a person injured in an adjacent field by reason thereof. *Williams v. C. & A. R. R. Co.,*

339

19. In the absence of legislation or municipal regulation a railroad may adopt such rate of speed for its trains as it deems advisable, providing it is reasonably safe to passengers being transported. *C., B. & Q. R. R. Co. v. Florens,*

365

20. It is not the duty of an engine driver, on nearing a crossing, to stop his train for the purpose of avoiding a collision with a team he may see approaching. *Id.*

365

21. In an action to recover from a railroad company for injuries in-

RAILROADS. *Continued.*

flicted upon a team at a highway crossing, this court holds that the defendant was not guilty of negligence in the premises, but that the plaintiff was negligent in failing to look for trains before driving upon the track. *Id.*, 365

22. In an action against a railroad company to recover for loss by fire, alleged to have been set by one of its locomotives, this court holds that a special finding of the jury setting forth that there was not sufficient proof to enable it to find at which of two places charged, the fire originated, was not inconsistent with a general verdict against the defendant, and constitutes no ground for setting aside the same. *C. & E. I. R. R. v. Goyette*, 574

23. The omission of the word "dangerous" before the word "combustible" from an instruction upon the duty of the railroad company to keep its right of way clear of dry weeds and combustible material, etc., did not, in the case presented, constitute reversible error. *Id.*, 574

24. It is proper to strike out of the instructions of a defendant in any action of this character such portion thereof as pretends but fails to cover the ground, touching the means and methods a railroad company is bound to adopt for the prevention of damages by fire from locomotives. *Id.*, 574

25. The appliances in such cases must be the most approved, they must be kept in the best of running order, and the methods and manner of running and handling the engines must be free from negligence on the part of those in charge. *Id.*, 574

RATIFICATION—See JUDGMENTS AND DECREES, 2.

REAL PROPERTY—See GUARANTY, 1; WITNESSES, 3.

1. Where the natural course and outlet for water on the land of one owner is over the land of another, such course can not be obstructed. *Patneau v. Claire*, 554

2. A purchaser of land knowing that a ditch runs across it from the land of another, can not lawfully close the same. *Id.*, 554

RECEIPTS—See DELIVERY, 1.

1. Receipts in writing, while evidence against the signer of high character, are not conclusive, but are subject to explanation, correction or contradiction. *O'Bannon v. Vigus*, 474

2. The weight to be given to such a receipt or admission, and the question whether it has been satisfactorily explained, is for the trial court to decide. *Id.*, 474

RECEIVERS—See PARTIES, 1.

REMEDIES—See ADMINISTRATION, 5.

REMOVAL OF CAUSES—See EVIDENCE, 3.

REPLEVIN.

1. In an action of replevin this court declines to consider alleged errors of the court below, it not appearing that injury resulted therefrom. *Welch v. Miller*, 110

2. In an action on a replevin bond, given by a party who sought

REPLEVIN. *Continued.*

to reclaim as fixtures covered by a real estate mortgage, certain property which had been taken on foreclosure of a chattel mortgage, the replevin suit having been dismissed and writ of *retorno* awarded, it is *held*: That a verdict for one cent damages was wrong, a portion of the property in controversy being clearly personal property. *Howell v. Barnard*, 120

3. In the case presented, it is *held*: That the plaintiff in the replevin suit and defendant in the action on the bond, was not estopped by the allegation in his affidavit for writ of replevin that the property was personal property, from showing in mitigation of damages, that the property was actually real and therefore not covered by the chattel mortgage. *Id.*, 120

4. In an action of replevin, brought to recover possession of some pigs, where the question was one of identity, which was in some respects a matter of opinion, the verdict of the jury is entitled to the same weight as upon a pure question of fact. *Brown v. Walker*, 199

5. Where in an action of replevin the trial court instructed the jury to find as in case of non-suit, which was accordingly done, and the motion for a new trial being overruled, "it was ordered that the defendant recover of the plaintiff possession of the property, with one cent damages and costs, with execution therefor, and that a writ of *retorno habendo* should issue therein," the judgment was correct in substance and sufficient in form. *Fowler v. Richardson*, 252

6. A horse attached as the property of another, may be replevied by the person selling him, upon the understanding that title should not pass until check given for purchase price should be paid, at any time previous to payment. *Gould v. Howell*, 349

7. Property in the lawful possession of another under a distress warrant should not be replevied without previous demand. *Ehle v. Deitz*, 547

8. It is proper in an action of replevin brought to recover property distrained, to submit to the jury, upon the request of the plaintiff, the question whether a reasonable time was given for the appointment of appraisers to value the same, after delivery of the schedule and before the institution of the suit. *Id.*, 547

SALES—See PARTNERSHIP, 1.

1. In an action upon a promissory note given by the purchaser of a separator, the contention involving the questions of warranty and set-off, this court declines to interfere with verdict for defendant. *Aultman v. Osborne*, 130

2. An order calling for the shipment of an engine is complied with by an offer to deliver one in the town where the same was written. *Aultman & Co. v. Henderson*, 331

3. Where a contract of sale contains provisions fixing the rights of the parties thereto, in case, after trial, the machine in question fails to comply with the warranty contained therein, the purchaser can not decline to receive the same upon the ground that the year before, in other hands, it failed to work properly. *Id.*, 331

SALES. *Continued.*

4. A machine that has been repaired will be presumed to be in working order and it is the duty of a person ordering such a machine to give it a fair trial. *Id.*, 331

5. From the evidence adduced, this court holds that defendant gave a warranty to plaintiff at the time of the sale in question. *Anderson v. Donaldson*, 404

6. In the case presented, this court holds that, although an instruction given for the plaintiff was defective, in that it left to be inferred that a mere statement by the defendant that certain hogs were sound, regardless of the time at which it was made or its object, would, if relied upon by the plaintiff, constitute a warranty, yet, as the evidence disclosed no such declarations except at the time of the sale, and other instructions were clear and positive to the effect that the statements should have been made for the purpose of assuring the buyer of the truth of the facts affirmed and thereby inducing a sale, such errors did no harm. *Id.*, 404

7. Where one question in issue was as to the terms of a contract of sale of tread power and stave cutter, the court, upon the case as presented, properly refused to instruct the jury that any statement made by one of the contracting parties after the sale, would not bind him, nor affect the validity of the original contract. *Creager v. Blank*, 615

SCHOOLS—See CONTRACTS, 4.

1. Upon a petition for *mandamus* to compel school directors to permit the use of a certain series of text books, alleged to have been adopted by the board at a meeting at which all were present, it will be presumed that the meeting was either a regular or special one, and a demurrer setting forth that it is not alleged that the action taken was at a regular meeting, as required by statute, will be overruled. *The People v. Frost*, 242

2. Reasonable notice is necessary to require attendance of the directors at a special meeting of the board; but if all the members come together and by mutual agreement hold a meeting, any objection to the shortness, or absence, of notice is waived. *Id.*, 242

3. Upon a judgment awarding a writ of *mandamus* to compel a board of education to reinstate a pupil in a public school, it is *held*: That the granting of costs against the board, with the award of execution therefor, was error, and that, although such error was corrected by amendment in the court below, after the record had been brought here on appeal, yet the costs of the appeal must go against the appellee. *Board of Education v. Helston*, 300

4. The suspension of a pupil until he shall comply with the requirements of the board can not be construed to extend beyond the current school year. *Id.*, 300

5. One who is improperly excluded from the common schools sustains an injury which the law will redress, but the enjoyment of the rights thus furnished by the State at public expense is necessarily con-

SCHOOLS. *Continued.*

ditioned upon that degree of good conduct on the part of each, which is indispensable to the comfort and progress of others. *Id.*, 303

6. It is within the discretion of the board to require a pupil to inform the board of the name, given to him by another pupil, of a party who had been guilty of a gross breach of rules, and, upon his refusal, to suspend him. *Id.*, 300

7. By gross profanity and vulgarity to the board, the pupil forfeits his right, if any, to reinstatement. *Id.*, 300

SEPARATE MAINTENANCE—See HUSBAND AND WIFE, 1.

SET-OFF—See ATTACHMENT, 2; SALES, 1.

1. A defendant can set off a judgment obtained by a third party against the plaintiff and assigned to the defendant before suit brought. *Young v. Young*, 109

SHERIFFS.

1. Under the laws of this State it is a part of the official duty of the sheriff to keep the county jail. He is entitled to no compensation therefor in addition to his salary, except as it may be provided by the county board, and he can not maintain an action against the county for money paid by him to an assistant jailer. *Goff v. Douglass County*, 145

SLANDER AND LIBEL.

1. In an action for slander, this court holds that a demurrer to the declaration was properly sustained, the words charged not being actionable *per se* and no sufficient averments appearing to show that the same touched the plaintiff in "some office, business or employment." *McLaughlin v. Fisher*, 54

SPECIAL FINDINGS—See NEW TRIAL, 1; RAILROADS, 22.

SPECIAL INTERROGATORIES.

1. The trial court necessarily possesses some discretion as to the number and character of the special interrogatories to be submitted to the jury, and in the case presented that discretion was not abused. *J. S. Ry. Co. v. Southworth*, 307

STATUTES.

1. A statute will never be held to be repealed by implication if such presumption can be avoided on any reasonable hypothesis. *President, etc., v. Town of Rushville*, 320

2. In the case presented, it is held that Sec. 4, Art. 7, of the charter of the town in question, in regard to the disposition of road and bridge taxes, was not repealed by the subsequent general law of 1883. *Id.*, 320

TRUSTS.

1. Complainants are children of appellee by a former wife, who died intestate. Prior to his first wife's death she became entitled, under the will of her father, to a distributive share of his personal estate. She personally settled with the executor of her father's estate for this share, by receiving from him a note given by her husband as part of the purchase price of their home farm, purchased by him some

TRUSTS. *Continued.*

time before, and having indorsed upon another similar note the balance of the share due her. The note paid in full she turned over to her husband. The husband subsequently paid out of his own means the balance of the other note. Subsequently the wife, with her husband, sold land devised to her by her father, and the proceeds were chiefly used for household expenses and by the husband in his business. *Held:* That appellee, there being no evidence of an express trust, was not chargeable as a trustee of the funds or property received from his wife for the benefit of her or her children; and that even if the wife had been presumed to have purchased the notes, which were secured by a purchase money lien on the home farm, to protect her dower right, and she were to be considered as subrogated to the creditor's security, that lien could not be enforced under a bill seeking to charge the husband as trustee. *Reed v. Reed*, 21

2. Moneys advanced by a trustee to purchase an outstanding title of property in which the *cestui que trust* has an equitable interest, will be treated in equity as so much advanced for the benefit of the *cestui que trust*, the trustee having a lien on the property until reimbursed for the advancement, and he must account for all profits arising out of the transaction. *Johnston v. Fletcher*, 589

USURY—See NEGOTIABLE INSTRUMENTS, 9.

WAIVER—See EVIDENCE, 14.

WARRANTY—See INSURANCE, 4; SALES, 1, 6.

WATERS—See RAILROADS, 9, 18; REAL PROPERTY, 1, 2.

WITNESSES—See EVIDENCE, 5; INSTRUCTIONS, 10, 13.

1. In an action on a promissory note by the administratrix of the indorsee, he having died after suit brought, where the defense relied on was fraud and circumvention on the part of agents of the payee in procuring the signature to the note, the maker of the note was a competent witness under Sec. 2, Chap. 51. R. S., 3d exception, as to conversations or transactions with him testified to by said agents at plaintiff's instance, said agents having a direct interest in the result of the suit. *Butz v. Schwartz*, 156

2. If payee's agents did not have a direct interest in the result of the suit, then defendant was a competent witness as to conversations or admissions by him testified to by these agents at plaintiff's instance, under the 4th exception. Under this exception all that was said and done on the occasion testified to, the *res gestæ*, was admissible. *Id.*, 156

3. In an action by creditors of the husband to set aside a conveyance of real property made to the wife by the husband, the latter is a competent witness for the wife. *Fleming v. Weagley*, 183

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